

IMPORTATION OF MEXICAN PRODUCE INTO THE UNITED STATES: PROCEDURES, DOCUMENTATION, AND DISPUTE RESOLUTION

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I. INTRODUCTION

The purchase of Mexican fruits and vegetables (Produce) for import across the U.S. border and sale in the United States is a large and important industry on both sides of the border. Imported Mexican fruits now account for 37% of all of the fruit import value and 69% of all vegetable import value imported into the United States, and that percentage is growing each year.¹ However, Produce import transactions are not only complex, but they must move with abnormal speed in order to avoid spoilage and devaluation of the Produce itself before reaching market. Further, these transactions also involve many “players,” most of whom play several different roles in the process. Combine these problems with differences in laws, language, and culture of the many parties involved, American and Mexican, and the process can be difficult to understand and manage.

Despite these many problems, the industry has had remarkable success in adopting very effective mechanisms to make these transactions work efficiently and fairly. As a result, the U.S. consumer is able to enjoy a variety of fine fruits and vegetables grown in Mexico² and transported quickly to market in prime condition, and the industry continues to grow and prosper more each year.

The purpose of this article is to identify exactly how such cross-border sales of perishable goods have been made to work by those involved, from the Grower/Seller to the ultimate Dealer and Retailer. In particular, this article will focus on the steps, methods, and procedures used by the parties to carry out such transactions, and which ultimately allow these transactions to work as effectively and efficiently as they do.

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¹ Tom Karst, *Mexico Dominates U.S. Produce Imports*, THE PACKER (Mar. 4, 2013), <http://www.thepacker.com/fruit-vegetable-news/201449021.html>.

² See Presentation of Linda Calvin, U.S. Dep’t of Agric. Econ. Research Service., U.S [sic] Produce Imports from Mexico (June 13-14, 2007).

II. THE UNIQUE NATURE OF THE IMPORTATION OF MEXICAN PRODUCE INTO THE UNITED STATES

Fresh vegetables and fruits are by their nature highly perishable. First, Produce deteriorates merely with time. Thus, every day of delay in getting the Produce to the ultimate Dealer for sale to the consumer means that more of the goods become overripe or outright spoiled, and in either case devalued.³ Further, regardless of the time delays inherent in delivering such perishable goods to market, there are also risks of deterioration and devaluation created by the mere handling of such Produce. For example, spoilage occurs from handling.⁴ Fruits and vegetables must be picked, packed, loaded for trucking, shipped, inspected, unloaded, warehoused, reloaded, trucked, and unloaded. Moreover, most Produce is sent to its final buyer only after being mixed with other types of Produce, since most buyers do not want a truckload of only one kind of Produce for sale.⁵ This, in turn, requires additional handling and time lost. Every time they are “handled,” even for such necessary reasons, a certain amount of the goods become spoiled, and therefore devalued.⁶ To avoid such spoilage, Produce must be processed through the system both quickly and efficiently, with minimum handling. Thus, while many products are briefly unloaded, stored in a warehouse at the border, and in any case reloaded for final shipping, they cannot stay long in the warehouse and must be moved out very quickly. Refrigerated trucks and warehouses can reduce the loss, but cannot eliminate it.⁷

These problems are compounded by the fact that no Grower can predict exactly when his crop will be ready to pick. Climate and unforeseen circumstances make any long-term prediction almost impossible.⁸ Similarly, when the Produce is ready to be picked, it must be picked promptly, and then immediately packed and trucked to market.⁹ This is true even if the Grower does not have a Dealer/Buyer when the Produce leaves his farm. These facts make it incumbent on the Grower, as well as the Dealer who wants to buy the freshest Produce available, to make their purchase and sale transactions at the last minute, and often even after the Produce has already been loaded and is being trucked to the border for sale.

³ Telephone Interview with Fred Webber, Vice-President, Fruit & Vegetable Dispute Resolution Corp. (Oct. 23, 2007) [hereinafter Webber]; Interview with Dan Coogan, Attorney-at-Law, Coogan & Martin P.C., in Nogales, Ariz. (Nov. 20, 2007) [hereinafter Coogan]. Mr. Coogan practices almost exclusively in the Produce Industry arena and is considered one of the most knowledgeable and experienced attorneys in this field. He is also one of the founders of the Fruit and Vegetable Dispute Resolution Corporation [DRC].

⁴ Webber, *supra* note 3; Coogan, *supra* note 3.

⁵ Coogan, *supra* note 3.

⁶ *Id.*; Webber, *supra* note 3.

⁷ Webber, *supra* note 3; Coogan, *supra* note 3.

⁸ Webber, *supra* note 3; Coogan, *supra* note 3.

⁹ Webber, *supra* note 3; Coogan, *supra* note 3.

For all these reasons, there is often little time to draft and sign formal contracts. All interested parties must “move” the goods without delay when they are ready. There is usually no time for lengthy negotiations or drafting of contracts.¹⁰ To compensate for these problems, the industry has generated, and in some cases, formalized, certain customs of operation that facilitate the efficient and effective movement of these highly perishable goods from Mexican farms to the U.S. market.

III. UNDERSTANDING THE IMPORTING TRANSACTION

To understand the customs, rules, and regulations that govern the industry, one must understand the process of importing Mexican Produce into the United States. First, however, one must understand who the parties involved are—the “Players”—and what they do. Then, one can analyze how the various types of transactions function as a practical matter.

A. The Main “Players”

The industry has adopted customs that have defined the roles, duties, and responsibilities of the “Players.” These customs have evolved into formal definitions that have been adopted by the industry in the *Fruit and Vegetable Dispute Resolution Corporation Trading Standards* (DRC Trading Standards)¹¹ and in the Perishable Agricultural Commodities Act (PACA).¹² Some of the more important Players will be described below.

The Grower: The Grower is the Mexican farmer who grows the Produce.¹³ Often, the Mexican Grower owns a family farm, large or small. The land has probably been in the family for more than one generation, and the Grower often intends to pass the operation on to his children. It is a family enterprise. As such, the Grower must have, or more likely will need to obtain, financing to plant and grow his crops each year, and at the same time bear all risks inherent in farming—temperature changes, rain, wind, pests, over-supply of a

¹⁰ Webber, *supra* note 3; Coogan, *supra* note 3.

¹¹ *Fruit and Vegetable Dispute Resolution Corporation Trading Standards*, DRC (Dec. 3, 2009) [hereinafter DRC TRADING STANDARDS], http://members.fvdrc.com/adx/asp/adxGetMedia.aspx?DocID=10,1,Documents&MediaID=9848&Filename=Trading_Standards_December_2009_english.pdf.

¹² Perishable Agricultural Commodities Act, 7 U.S.C. §§ 499a–t (1930) (amended 1995).

¹³ DRC TRADING STANDARDS, *supra* note 11, § 19, ¶ 12; see Regulations (Other than Rules of Practice) Under the Perishable Agricultural Commodities Act, 7 C.F.R. § 46.2(p) (2010).

crop, fluctuating prices, and others.¹⁴ The Grower is also a Dealer, as described later.¹⁵

The Shipper: The Shipper is the party at any particular shipping point that either owns or purchases the Produce for distribution or resale.¹⁶ There may be more than one shipping point in getting any load of Produce to market. For example, the first shipping point may be from the Grower's loading dock, and a second shipping point may be the loading dock of a warehouse in the United States where the Produce has been briefly warehoused prior to delivery to its ultimate destination. It is generally the Shipper who bears the risks and financial responsibility for moving the Produce from a particular shipping point to the next destination. The Shipper may be the Grower,¹⁷ Grower's Agent¹⁸ (including a "Commission Merchant"),¹⁹ Carrier, Dealer,²⁰ or combinations of these. In particular, the role of a Shipper must be distinguished from that of a Carrier, defined below, although Shipper and Carrier may be the same parties.

The Carrier: The Carrier is the owner of the vehicle or other means of transportation that transports the Produce, as ordered by the Shipper. The Carrier is liable to the Shipper for damage to or loss of cargo while in transport on his vehicle.

The U.S. Inspector: The U.S. government Inspector inspects the Produce for compliance with U.S. quality standards before they come across the U.S. border (which inspection may be referred to as the "U.S. Inspection" in this article). The duties of this Inspector must be distinguished from the "Conformance Inspection," which is performed by any receiver of Produce under a contract or purchase order (PO).

The Conformance Inspector: The Conformance Inspector is the person who conducts the Conformance Inspection upon receipt of Produce pursuant to a contract or PO to assure that the Produce received conforms to the requirements of the contract or PO.

The Broker: The Broker is the person who represents the Grower and/or another Dealer in negotiating and arranging the sale and purchase of certain Produce.²¹ Usually, each Grower has a Broker, who is also the Grower's Agent.²² The Broker is usually paid a commission by his client,²³ although if he also acts as the Agent he may have contracted for other forms of compensation, as will be discussed below. "The [B]roker is expected to issue written or electronic

¹⁴ Webber, *supra* note 3.

¹⁵ See *infra* notes 25–26 and accompanying text.

¹⁶ DRC TRADING STANDARDS, *supra* note 11, § 19, ¶ 23; see 7 C.F.R. § 46.2(o).

¹⁷ See *supra* notes 13, 16 and accompanying text.

¹⁸ See *infra* notes 32–33 and accompanying text.

¹⁹ See *infra* notes 34–36 and accompanying text.

²⁰ See *infra* notes 30–31 and accompanying text.

²¹ 7 C.F.R. § 46.2(n); DRC TRADING STANDARDS, *supra* note 11, § 19, ¶ 4. See also

DRC TRADING STANDARDS, *supra* note 11, Glossary of Terms, and 7 U.S.C. § 499 a(b)(7), for further definitions of "Broker" and "Dealer's Broker."

²² Coogan, *supra* note 3.

²³ *Id.*

confirmations showing all the contract terms to which the selling Dealer and the buying Dealer have agreed to, as well as the identity of both.”²⁴

The Warehouseman: As used herein, the Warehouseman is the person who operates a warehouse at the border, usually on the American side, where Produce is briefly stored in bailment pending sale and/or shipment.²⁵ The Warehouseman may also be a Dealer, the Broker, and/or an Agent for Grower or another Dealer. The Warehouseman may warehouse Produce “in bond” or not “in bond.” A bonded warehouse is a warehouse containing stored goods on which applicable duties have not been paid. Except in rare circumstances, Mexico does not impose export duties on goods going to the United States under NAFTA, so any duties payable will accrue to the United States. In the United States, a bonded warehouse obtains a bond in favor of the government guaranteeing payment of liquidated damages in the event goods are improperly removed from the warehouse or the warehouseman fails to comply with procedures mandated by U.S. Customs and Border Protection.²⁶ While the goods, such as Produce, are in a bonded warehouse, they can be packaged or repackaged. The Warehouseman has liability to the owner of any Produce damaged or lost in the warehouse,²⁷ although the amount of liability may be limited by the terms of the warehouse receipt.²⁸ Today, both ordinary and bonded warehouses are often refrigerated to better preserve the Produce. To document his receipt of the Produce, a Warehouseman issues either a negotiable or a non-negotiable “warehouse receipt” to the party depositing the Produce in the warehouse.²⁹ The Uniform Commercial Code provides that a warehouse receipt or other document of title is negotiable if it states that the bailed goods are to be delivered to “bearer” or “to order,” rather than a named person or entity, or where it states that the goods are to be delivered to a “named person or assigns” where such statements are “recognized in overseas trade.”³⁰ Any other form of warehouse receipt is therefore “non-negotiable.”

²⁴ DRC TRADING STANDARDS, *supra* note 11, Glossary of Terms (“Broker”); *see also* 7 C.F.R. § 46.28.

²⁵ *See* U.C.C. § 7-102(a)(13) (2013) (defining “warehouse” as “a person engaged in the business of storing goods for hire”).

²⁶ *See generally* Customs Bonds, 19 C.F.R. § 113.63 (2009).

²⁷ *See* U.C.C. § 7-204(a).

²⁸ *Id.* § 7-204(b).

²⁹ *See id.* § 7-201(a), which states, “A warehouse receipt may be issued by any warehouse.” The form of a warehouse receipt can vary and is provided for in § 7-202.

³⁰ U.C.C. § 7-104(a). Note that the 2013 revision of § 7-104(a) no longer defers to “overseas trade” to determine negotiability of a document in which goods are to be delivered to a “named person or assigns.” Under the 2013 revision, “a document of title is negotiable if by its terms the goods are to be delivered to bearer or to the order of a named person”, and all other documents are non-negotiable. *See, e.g.*, 2013 Mass. ALS 30, 45. As of October 2013, only the District of Columbia, Massachusetts, and New Jersey have codified this revision.

The Dealer: The Dealer is the person who actually purchases or sells the Produce,³¹ whether a Grower, Warehouseman, a wholesale Produce distributor inside the United States, or a Retailer.³² As indicated above, virtually every Dealer must be concerned about the speed and efficiency with which he can both order and receive Produce that conforms to his required standards.

The Grower's Agent: The Grower's Agent operates at a shipping point and sells or distributes on behalf of Growers,³³ thereby also acting as his Broker. In addition, the Grower's Agent often acts as the financier or banker of the Grower's operation.³⁴

The Commission Merchant: The Commission Merchant is the person or firm located at the destination marketplace that sells Produce on a load-by-load basis.³⁵ He may act for one seller or on "joint account" for several. He does not take title to the Produce, but sells on consignment.³⁶ He may be the Grower's Agent. A Commission Agent is similar to a Broker except that the former has more discretion to act without his principal's knowledge in selling to Buyers or consigning to consignees unknown to the principal.³⁷

The Retailer: This is any person who engages in selling Produce at retail.³⁸ The Retailer is also a Dealer.

³¹ DRC TRADING STANDARDS, *supra* note 11, Glossary of Terms ("Dealer"); *see also* 7 U.S.C. § 499a(b)(6); 7 C.F.R. § 46.2(m).

³² *See infra* note 38 and accompanying text.

³³ 7 C.F.R. § 46.2(q); DRC TRADING STANDARDS, *supra* note 11, § 19, ¶ 13.

³⁴ Coogan, *supra* note 3; *see infra* notes 39–77 and accompanying text (explaining the relationship between the Grower and Grower's Agent). *See infra* app. A-I, for sample forms of agreement between a Grower and the Grower's Agent.

³⁵ 7 U.S.C. § 499a(b)(5); DRC TRADING STANDARDS, *supra* note 11, Glossary of Terms ("Commission Merchant").

³⁶ DRC TRADING STANDARDS, *supra* note 11, Glossary of Terms ("Commission Merchant").

³⁷ *See* 7 C.F.R. § 46.27(a) ("[Seller gives commission merchant] blanket authority to dispose of the produce for the seller's account either by negotiation of sales to buyers not known to the seller or by placing the produce for sale on consignment with receivers in the terminal markets."). But this distinction is not as clear in the DRC provisions. *Compare* DRC TRADING STANDARDS, *supra* note 11, § 19, ¶ 4 (defining "Broker" as "any person engaged in the business of negotiating sales and purchases of produce for or on behalf of the vendor or the purchaser, respectively"), *with* DRC TRADING STANDARDS, *supra* note 11, § 19, ¶ 5 (defining "Commission Merchant" as "any person engaged in the business of receiving any perishable agricultural commodity for sale, on commission, or for or on behalf of another").

³⁸ DRC TRADING STANDARDS, *supra* note 11, § 19, ¶ 22; *see* 7 U.S.C. § 499a(b)(11).

B. The Typical Import Transaction

1. Agent Brokerage/Financing

The typical Produce import transaction involves two or more stages. The first stage is the arrangement between the Grower in Mexico and his Agent on the border. The subsequent stages involve the sales of the Produce by the Agent, on behalf of the Grower, to Dealers and the passage of the Produce to other Dealers and ultimately the Retailer. Each of these stages is discussed below.

In the first stage of the transaction, the Grower identifies a Broker/Agent (collectively “Agent” below) at the border with whom he desires to work, usually for the entire growing season,³⁹ and sometimes for multiple seasons.⁴⁰ The Agent will usually perform one or both of two major functions for the Grower: the function of exclusive broker and the separate function of banker. Typical forms of contract establishing this type of relationship (Agency Agreements) are attached and are discussed below.⁴¹

At minimum, the Agent and the Grower will usually establish a simple exclusive brokerage arrangement, where the Grower arranges for his own financing and uses the Agent solely to broker his products.⁴² While the Agent has exclusive rights, the Agent also has the right to reject crops that, in his sole judgment, are not marketable.⁴³ Upon receipt of the products from the Grower, the Agent becomes responsible for properly warehousing them, obtaining inspections, undertaking enforcement actions (including PACA Trust Enforcement Actions),⁴⁴ and taking other actions deemed appropriate by the Agent to protect or market the goods, although these costs are for the account of the Grower and will be deducted from any sales proceeds.⁴⁵ The Agent also has sole control over marketing, selling, and consigning the Produce.⁴⁶ Further, while he is bound to make good faith efforts to obtain the best prices he can, he may sell to any purchaser he chooses and can establish sales prices and terms for the Produce in his sole discretion as well.⁴⁷ Indeed, he typically has the right to set long-term prices, with the express understanding that, in so doing, the pre-set sales price at any one point in time may not equal the going market price at the time.⁴⁸ In addition, the Agent typically has the authority to enter into promotional arrangements with customers and even to pay promotional allowances, incentives,

³⁹ See, e.g., *infra* apps. A-1, -2.

⁴⁰ See, e.g., *infra* app. A-3.

⁴¹ See, e.g., *infra* app. A-1.

⁴² See, e.g., *infra* app. A-1.

⁴³ See, e.g., *infra* app. A-1, ¶ 2.

⁴⁴ See *infra* notes 331–32 and accompanying text.

⁴⁵ See, e.g., *infra* app. A-1.

⁴⁶ See, e.g., *infra* app. A-1.

⁴⁷ See, e.g., *infra* app. A-1.

⁴⁸ See, e.g., *infra* app. A-2.

or rebates, all on the account of the Grower.⁴⁹ For these services, the Agent receives a brokerage fee.⁵⁰ He recoups this fee from sales proceeds, deducts any costs accrued on the Grower's account, and then pays the balance to the Grower.⁵¹

Second, many Agency Agreements recognize that the typical Grower needs financing to buy his seed and to sow, fertilize, and harvest his crop. Further, the Grower must buy and maintain equipment, hire employees, and have funds for sustaining his entire operation in anticipation of the sale of his Produce.⁵² In many cases, the Grower has already used his own Mexican banking relationships and is already carrying substantial debt, so that he either desires not to use, or cannot use, these Mexican financing sources for his crop financing.⁵³ Moreover, since U.S. interest rates are usually lower than those in Mexico, it is to his advantage to use this cheaper financing.⁵⁴ Therefore, in many Agency transactions, the Agent not only acts as the Grower's Agent, but also acts as Grower's banker and supplies operating funds in the form of one or more loans. Because the loans are for crop production for an entire growing season, the Agency Agreement usually is an exclusive agreement for the entire season⁵⁵ or even multiple seasons.⁵⁶

The actual terms and conditions of an Agency transaction and the Agency Agreement can vary.⁵⁷ Generally, however, the Grower and the Agent establish the amount and terms of the loan. The loan may also provide for future advances in addition to the initial loan amount. The parties also usually agree that the debt will be secured by giving the Agent a U.S. security interest under the applicable State's Uniform Commercial Code⁵⁸ against several forms of collateral. It appears typical that collateral will include not only the crops being directly financed by the Agent, but also crops grown by the Grower elsewhere and even "all crops purchased, delivered, or consigned to Grower."⁵⁹ The collateral also will probably include all proceeds and accounts receivable arising from any of the above crops, all rights under insurance contracts, certificates of deposits, deposit accounts, letters of credit, all securities and investment property relating to or

⁴⁹ See, e.g., *infra* app. A-1.

⁵⁰ See, e.g., *infra* app. A-1.

⁵¹ See, e.g., *infra* app. A-1.

⁵² Webber, *supra* note 3; Coogan, *supra* note 3.

⁵³ Coogan, *supra* note 3.

⁵⁴ *Id.*

⁵⁵ See, e.g., *infra* app. A-2.

⁵⁶ See, e.g., *infra* app. A-3.

⁵⁷ See, e.g., *infra* app. A-3. Parties to such an agreement will, of course, consider the particular circumstances (e.g., crop, season, market prices, stability, and creditworthiness of the grower) and tailor the agreement accordingly (e.g., duties of the parties, payment terms, rights and remedies, and limitations on Agent's powers). In the Appendix A-3 agreement, for example, the Agent ("Distributor") himself finances the Grower.

⁵⁸ See, for example, ARIZ. REV. STAT. ANN. §§ 47-9101 to 709, for the State of Arizona's adoption of the U.C.C.

⁵⁹ See, e.g., *infra* apps. A-2, -3.

arising from the sale or transfer of the crops, and chattel paper, general intangibles, customer lists, goodwill, licenses, permits, and agreements pursuant to which Grower has the right to possession or use of the property of others.⁶⁰ Agents also often attempt to include in their security interests liens against other assets of the Grower located in Mexico.⁶¹ These might include liens against the Grower's equipment, machinery, furniture, and fixtures, the Grower's books and records, and his inventory.⁶² This loan arrangement is documented in at least five documents:

- 1) The Agency Agreement;⁶³
- 2) A Promissory Note;
- 3) A Security Agreement written in conformity with the U.S. Uniform Commercial Code;⁶⁴
- 4) A UCC-1 Financing Statement;⁶⁵
- 5) A Mexican mortgage or "hipoteca" against the Grower's real estate in Mexico;⁶⁶ and usually
- 6) A Mexican "security interest," called a "prendaria," against the equipment and other personal property of the Grower.⁶⁷

These Mexican liens will be "perfected" in Mexico, as required under Mexican law, by a Mexican lawyer who is brought into the transaction by the Agent's U.S. attorney.⁶⁸

The U.S. personal property liens are perfected in an unusual manner, however. First, the UCC-1 is recorded in the U.S. state where the Produce will enter the United States to perfect the lien. Of course, this will perfect the lien only in that U.S. state. Nevertheless, presuming that the Agent and his lawyer have been cautious to be certain that no prior liens exist against the collateralized crop in that state's registry, then when the goods do cross the border into that state the Agent will have a first lien on them, thereby securing his right to repayment from sales proceeds. In addition, to filling the UCC-1 in that U.S. state, the Agent and his attorney will check to see whether other liens have been filed by any third parties against the collateralized crop in the U.S. Registry in Washington, D.C.⁶⁹ By checking that registry, he can see whether it shows liens related to crops grown on the Grower's land. Moreover, the Registry is checked to see whether the Grower's Mexican Tax Identification numbers, which are used in identifying the

⁶⁰ See, e.g., *infra* apps. A-2, -3.

⁶¹ Coogan, *supra* note 3.

⁶² See, e.g., *infra* apps. A-2, -3.

⁶³ See, e.g., *infra* app. A-3.

⁶⁴ See, e.g., ARIZ. REV. STAT. ANN. §§ 47-9101 to 709; see also *infra* apps. A-1, -3.

⁶⁵ Coogan, *supra* note 3.

⁶⁶ Coogan, *supra* note 3; see, e.g., *infra* apps. A-1, -3.

⁶⁷ Coogan, *supra* note 3.

⁶⁸ *Id.*

⁶⁹ *Id.*

Grower in the Registry, show up there. Either of these factors would indicate prior liens against the Grower and his crop.⁷⁰

Finally, the Agent is further secured by the nature and customs of the industry as a whole. The industry is a small world, and everyone knows what everyone else is doing.⁷¹ Everyone knows what Produce is crossing the border and who has interests in it.⁷² Most importantly, everyone knows everyone else, especially amongst the Brokers and Agents, who are located at the border and know everything happening there.⁷³ Agents, Brokers, and their Dealers rarely buy Product from someone they are not comfortable with and do not know.⁷⁴

As noted above, the Agent operates in this situation not only as the Grower's banker, but also as the Grower's selling Broker.⁷⁵ Thus, having financed the Grower's crops, the agreement between Grower and Agent provides not only for repayment of the loan, but also that the Agent has the exclusive right to sell the crop. In this regard, the Agency Agreement usually provides that the Agent has the sole right to sell the crop on whatever terms and conditions he determines reasonable.⁷⁶ As such, the Agent will never hold full title to the goods, and the Agent, instead of the Grower, will be in charge of finding the Dealer and documenting the sale. Upon sale, he will deduct what he is owed on the loan, plus a selling commission, and return the balance to the Grower.⁷⁷

2. The Sale

The industry has adopted mechanisms that move goods efficiently, as well as define and protect the rights and duties of the selling and buying parties, once the crop is on the way to the Agent, and often before it even reaches him at the border. Each transaction generally commences with a communication by telephone, fax, or email between the Grower or his Agent/Broker and the buying Dealer. In the initial and reply communications, the parties identify the type, quality, quantity, and price of the Produce to be purchased and sold.⁷⁸ The Dealer will need certain products at certain prices and will locate a Grower who has those products to sell. In addition to identifying the product, and the Dealer and the Grower who match up with the specifications of that transaction, the parties will need to establish the credentials and reliability of the other party. Recognizing

⁷⁰ *Id.*

⁷¹ Webber, *supra* note 3; Coogan, *supra* note 3.

⁷² Webber, *supra* note 3; Coogan, *supra* note 3.

⁷³ Webber, *supra* note 3; Coogan, *supra* note 3.

⁷⁴ Webber, *supra* note 3; Coogan, *supra* note 3.

⁷⁵ See *infra* apps. A-2, at 2; A-3, at 10.

⁷⁶ See *infra* apps. A-2, at 2; A-3, at 10.

⁷⁷ See, e.g., *infra* apps. A-2, -3.

⁷⁸ Webber, *supra* note 3.

that the industry is relatively small, most of the parties know each other either from prior dealings or at least by reputation.⁷⁹

To the extent that they do not know each other, the industry has developed very effective methods to establish credentials quickly, even during the initial telephone call itself.⁸⁰ First, the need for quick and reliable analysis of credit and financial ratings has caused the development of at least two crediting agencies. These are known as the “Red Book”⁸¹ and the “Blue Book.”⁸² These services report, *inter alia*, credit and marketing information. Using either or both of these services, the parties can quickly establish the credit and reliability ratings of the other.

Further, the parties can use these services to quickly check to see if an American party is licensed by the Fruit and Vegetable Program of the Agricultural Marketing Service (AMS) of the U.S. Department of Agriculture (USDA), discussed below. This license is issued pursuant to the Perishable Agricultural Commodities Act⁸³ and is called a PACA license. Since all U.S. traders of commercial quantities of fresh or frozen fruits or vegetables must obtain a PACA license, and since licensees are strictly regulated by AMS,⁸⁴ the Mexican party (and his Broker/Agent) will want to be sure that the American Dealer is properly licensed and regulated.⁸⁵ Indeed, even though not himself a licensee of PACA, the Mexican party can seek redress against such a licensee pursuant to PACA’s dispute resolution provisions.⁸⁶ These provisions give the Mexican party the ability to seek compensation from the American party in a quick and efficient manner, although the Mexican party must first post a bond of double the amount of compensation sought.⁸⁷

In addition, both the American and the Mexican parties will often check to see if the other is a member of the Fruit and Vegetable Dispute Resolution Corporation (DRC).⁸⁸ The DRC is a private entity that has been developed by the industry, with offices in Canada, the United States, and Mexico.⁸⁹ The DRC was founded in 1999 as the result of the recommendation of the Committee on Agricultural Trade, which is a body organized pursuant to Article 707 of the North

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See, e.g., *Red Book Credit Services*, VANCE PUBL’G CORP., <http://www.rbcs.com> (last visited Sept. 3, 2013).

⁸² See, e.g., *BLUE BOOK SERV.*, <http://www.bluebookservices.com/default.aspx> (last visited Sept. 17, 2013).

⁸³ See 7 U.S.C. §§ 499a–t.

⁸⁴ *Id.* § 499d–e.

⁸⁵ Webber, *supra* note 3.

⁸⁶ See *infra* notes 299–337 and accompanying text.

⁸⁷ 7 U.S.C. § 499f; 7 C.F.R. § 47.6(b).

⁸⁸ Webber, *supra* note 3.

⁸⁹ *Origins, Creation, and Evolution of the Fruit & Vegetable Dispute Resolution Corporation*, DRC (Jan. 2012), http://www.fvdrcc.com/media/14918/drc_history_project_final_report.pdf.

American Free Trade Agreement (NAFTA).⁹⁰ That body determined that the produce industry active in NAFTA countries needed a formalized and uniform dispute resolution mechanism. The DRC is not merely a dispute resolution mechanism, however. Its members have also adopted detailed and effective rules and regulations governing most aspects important to the industry. These include rules and regulations pertaining to Trading Standards,⁹¹ Transportation Standards,⁹² Goods Inspection Guidelines,⁹³ Goods Arrival Guidelines,⁹⁴ and Mediation and Arbitration Rules.⁹⁵ Members of the DRC may be those operating in the commerce of fresh fruits and vegetables within Canada, Mexico, and the United States.⁹⁶ Further, because the DRC is a private entity, it is able to set higher standards for membership than PACA, which is a government entity. Any person who meets the minimum standards of PACA's licensing provisions, such as simply buying or selling commercial quantities of fruits and vegetables, may apply for a license under PACA.⁹⁷ Moreover, while PACA licensees may lose their license for cause for up to two years,⁹⁸ members of DRC who have lost their

⁹⁰ The provision states:

The Committee shall establish an Advisory Committee on Private Commercial Disputes regarding Agricultural Goods, comprising persons with expertise or experience in the resolution of private commercial dispute in agricultural trade. The Advisory Committee shall report and provide recommendations to the Committee for the development of systems in the territory of each Party to achieve the prompt and effective resolution of such disputes, taking into account any special circumstance, including the perishability of certain agricultural goods.

North American Free Trade Agreement, § 707, Dec. 17, 1992, 32 I.L.M. 289, 369 (1993).

⁹¹ See DRC TRADING STANDARDS, *supra* note 11.

⁹² See *Fruit and Vegetable Dispute Resolution Corporation Transportation Standards*, DRC (Dec. 4, 2008) [hereinafter DRC TRANSPORTATION STANDARDS], http://www.fvdr.com/media/6976/DRC_Trans_Std_December_4_2008_Eng.pdf.

⁹³ See *Fruit and Vegetable Dispute Resolution Corporation Goods Inspection Guidelines*, DRC (Dec. 4, 2008) [hereinafter DRC GOODS INSPECTION GUIDELINES], http://www.fvdr.com/media/6985/Good_Inspection_Guidelines_December_4_2008_english.pdf.

⁹⁴ See *Fruit and Vegetable Dispute Resolution Corporation Goods Arrival Guidelines*, DRC (May 22, 2009) [hereinafter DRC GOODS ARRIVAL GUIDELINES], http://www.fvdr.com/media/6982/Good_Arrival_Guidelines_May_22_2009_english.pdf.

⁹⁵ See *Fruit and Vegetable Dispute Resolution Corporation Mediation and Arbitration Rules*, DRC (May 26, 2011) [hereinafter DRC DISPUTE RULES], http://www.fvdr.com/media/6967/DRC_Med_and_Arb_Rules_May_26_2011_english.pdf.

⁹⁶ See *Fruit and Vegetable Dispute Resolution Corporation By-Laws*, DRC (June 11, 2012), http://www.fvdr.com/media/6964/By_Laws_English_May%202012.pdf.

⁹⁷ 7 U.S.C. § 499c.

⁹⁸ See 7 U.S.C. §§ 499(b)A, C.

membership for cause might not be readmitted at all.⁹⁹ For all of these reasons, DRC members know that other members meet reasonably high standards and have subjected themselves to very substantial rules and regulations of the DRC as well as to its dispute resolution provisions. Thus, they have confidence that trade with other DRC members across the border will be well regulated by the DRC rules.¹⁰⁰ Thus, while the Mexican party will want to be certain that the American party is licensed by PACA, both parties (including the Mexican party) to the purchase and sale of Produce from Mexico will benefit if the other party is a DRC member.¹⁰¹ Unfortunately, at the present time, it has been estimated that no more than 20% of the Mexican Growers are currently DRC members, although that percentage seems to be growing.¹⁰² Therefore, the benefits of the DRC have still not come to fruition, and the DRC is not yet the positive factor it will ultimately be in the Mexican Produce arena.

Once the parties have established the financial and industry credentials of the other and have discussed the price, quantity, and delivery terms of the transactions, the Dealer will send a PO to the seller. This will usually be sent by facsimile, or even by email, to keep the transaction moving quickly. Upon receipt, the Grower or his Broker will send a confirmation to the Dealer. This may take any form, as long as the acceptance is clear and unconditional.¹⁰³

In any case, while the Agent is marketing the Produce, the Grower is timely picking, packing, and loading the Produce onto trucks for shipment to the border where it will be delivered to the purchasing Dealer or warehoused briefly, pending sale. To do this, the Grower will use a Carrier selected by the Grower in Mexico.

Once the Produce reaches the border, several things happen. Upon arrival, the Produce are inspected by the U.S. Inspector and are unloaded. At that time, the Broker/Agent arranges for customs clearance procedures and payment of any customs duties and fees, and the goods are reloaded on the U.S. side for continuation of the trip to either the warehouse or directly to the Dealer's location. Alternatively, NAFTA now permits Mexican Carriers to retain their loads and cross into the United States to complete delivery.¹⁰⁴ If this method is used, the goods may not need to be unloaded before continuing to their destination. In any case, once the goods reach the border and the designated delivery point to the purchasing Dealer, the goods are unloaded and a Bill of Lading (BOL) is prepared by the Broker/Agent and given to the purchasing Dealer or that Dealer's Carrier.¹⁰⁵ However, whether the Carrier is employed by the Grower or another Dealer, and therefore which of these two is the Shipper,¹⁰⁶ will be determined by

⁹⁹ Webber, *supra* note 3.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Coogan, *supra* note 3.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Webber, *supra* note 3.

¹⁰⁶ See *supra* notes 16–20 and accompanying text.

the nature of the deal made. For example, if the parties agree to f.o.b. delivery terms, which is usual,¹⁰⁷ then the purchasing Dealer is responsible for the cost and risk of shipping together with the cost of freight.¹⁰⁸ Further, if the Dealer is the Shipper, so that the Grower will no longer be responsible for the goods, then the Dealer's agent, as Dealer's Conformance Inspector, may inspect the goods. Alternatively, the Dealer may wait to hold the Conformance Inspection until final delivery of the goods to the final destination designated by the PO.¹⁰⁹

Finally, arrangements for payment of the purchase price would be made between the Broker/Agent and the purchasing Dealer. Payments across international borders could be made via a letter of credit,¹¹⁰ but letters of credit take time to process and, as already noted, time is of the essence with perishable goods, which must hit the market place within a few days. Typically, because the PACA regulation and licensure of the American party provides a measure of trustworthiness,¹¹¹ the general custom in the industry is that the Grower or his Broker simply provides seller with an invoice and payment is made.¹¹² This theoretically could occur at the time the goods are loaded onto the trucks if the Dealer is the Shipper and "delivery" therefore occurs upon loading. However, the parties do not involve the Carrier in receiving and safeguarding payment documents, and therefore normally the Grower simply sends the invoice to the Seller electronically and, after receipt and inspection, the Dealer pays the same.¹¹³

Further, if the Dealer was the Shipper, but he did not perform the Conformance Inspection at the time of initial loading, then the Dealer's Conformance Inspector inspects the Produce.¹¹⁴

3. Subsequent Sales

In addition to the original sale, which often occurs even before, the Produce is loaded as described above, the Produce may be resold again at any time after loading and during transportation to the border.¹¹⁵ For example, the original purchaser may be a Warehouseman who purchases for resale, or merely a Dealer who makes a business of buying and selling on the margin for a profit. In the former case, the Warehouseman will simply resell the Produce, and when possible, repeat the sale transaction described above.

¹⁰⁷ Coogan, *supra* note 3; *see, e.g., infra* apps. A-1, at 2; A-2, at 2, 5; A-3, at 10.

¹⁰⁸ 7 C.F.R. § 46.2(p); DRC TRADING STANDARDS, *supra* note 11, § 20, ¶ 5.

¹⁰⁹ This would appear to be a dangerous method, however, as it will then be difficult to prove whether damage or defects in the Produce occurred before or after delivery to the Carrier. In the event of such damage or defects, it will therefore be more difficult for the Dealer to establish the Grower's fault and liability for same.

¹¹⁰ Webber, *supra* note 3.

¹¹¹ *See supra* note 82 and accompanying text.

¹¹² Webber, *supra* note 3; Coogan, *supra* note 3.

¹¹³ Webber, *supra* note 3; Coogan, *supra* note 3.

¹¹⁴ Webber, *supra* note 3; Coogan, *supra* note 3.

¹¹⁵ Webber, *supra* note 3.

Alternatively, the reseller may be a Dealer who makes a business of reselling for profit. In this event, the Dealer may conduct the transaction “on the move.”¹¹⁶ This is facilitated by the marvels of modern electronic communications, which make it possible to communicate with, and direct, the Carrier according to the nature of the negotiated arrangements. Indeed, some Carriers act as Dealers. In this case, the Carrier can negotiate the deal directly from his truck, receive the PO at his office (or even in the truck), and confirm in the same way. Ultimately, either through the original sale, or through one or more resales, the Produce reaches the Retailer and ultimately the consumer.

IV. METHODS OF DOCUMENTING THE SALES TRANSACTIONS

As shown above, the original transaction between the Grower and his Agent is documented in an Agency Agreement that is normally exclusive and is usually valid for an entire growing season.¹¹⁷ However, this is not a sales transaction, but simply an agreement that leaves the Agent in a position to sell. Unlike the formal written Agency Agreement, import purchases by American Dealers occur virtually only by PO and confirmation, and without formal written contract.¹¹⁸ This occurs because the Grower and his Agent do not know until the last moment exactly when the Produce will be ready to be picked and packed, and therefore, they will not know until the last moment when they can safely enter into an agreement to sell them. Indeed, the Produce may already be loaded and “on the move” to the border before they are sold. These facts, combined with the perishable nature of the Produce, require speed and efficiency in transacting the deal. There just is not enough time to negotiate and draft lengthy contracts for each sale.

Despite the need for speed in moving Mexican Produce to the U.S. market, however, the parties cannot, of course, ignore the necessity of somehow documenting each transaction. As with any other industry, the parties need to document their rights and duties both to avoid disputes and, if necessary, to resolve disputes. In the absence of time to negotiate and draft individual contracts in such transactions, therefore, the industry has developed customs accepted by all Players¹¹⁹ in the industry, which provide the customary “rules of the game,” and which operate as the contractual terms and conditions of the deal.¹²⁰ These customs are so well accepted that they have been formally adopted into the rules and regulations of DRC and PACA.¹²¹ Since all of the American Players must be

¹¹⁶ *Id.*

¹¹⁷ See *supra* notes 39–77 and accompanying text; see, e.g., *infra* apps. A-1, -2, -3.

¹¹⁸ Webber, *supra* note 3; Coogan, *supra* note 3.

¹¹⁹ See *supra* notes 13–38 and accompanying text.

¹²⁰ Coogan, *supra* note 3.

¹²¹ Compare 7 C.F.R. §§ 46.1 to .43, with DRC TRADING STANDARDS, *supra* note 11.

See, for example, 7 U.S.C. § 499b, which describes “Unfair Conduct” in terms almost identical to the definition in DRC TRADING STANDARDS, *supra* note 11, § 2.

licensed by PACA,¹²² and a small, but growing, number of Mexicans are members of DRC,¹²³ in order for them to be “accepted” as “credentialed” in the industry as being worthy to deal with,¹²⁴ these rules and regulations are effectively binding and enforceable on all Players. Indeed, PACA applies to all U.S. licensees by law,¹²⁵ and the DRC Trading Rules specifically state: “[T]hese Trading Standards shall apply to *all* transactions entered into by a member or associate member of the Fruit and Vegetable Dispute Resolution Corporation, *whether or not the transaction is with another member . . . or a non-member.*”¹²⁶ As will be shown, these rules and regulations effectively provide for all of the terms and conditions of Produce sales agreements for Produce to be imported from Mexico into the United States, as well as for methods of resolving disputes efficiently.

A. The Rules For Trading

As already noted, the speed with which Mexican-U.S. Produce transactions occur makes it difficult, if not impossible, to document all the terms and conditions necessary in a contract for sale of goods, other than the quantity, purchase price, and method of delivery as provided in a basic PO. The general terms and conditions of contractual agreements in the Mexican-U.S. Produce industry are therefore found in the rules and regulations adopted by the industry based on time-tested customs. The most basic sets of these rules and regulations are known as the PACA Regulations (PACA Regs.)¹²⁷ and the DRC Trading Standards.¹²⁸ The PACA Regs. and DRC Trading Standards supply most of the terms and conditions that would be found in any sales contract.

1. Duties of the Parties

Both the PACA Regs. and the DRC Trading Standards specify the duties of all of the major parties to any Produce transaction, although they sometimes differ in their specificity. For example, while PACA does not spell out specific duties of a Dealer,¹²⁹ Section 10 of the DRC Trading Standards does. This

¹²² See *supra* notes 84–87 and accompanying notes.

¹²³ See *supra* notes 84–87 and accompanying notes.

¹²⁴ See *supra* notes 84–87 and accompanying notes.

¹²⁵ 7 U.S.C. § 499c.

¹²⁶ DRC TRADING STANDARDS, *supra* note 11, § 21 (emphasis added).

¹²⁷ See *generally* 7 C.F.R. pt. 46.

¹²⁸ See *generally* DRC TRADING STANDARDS, *supra* note 11.

¹²⁹ But 7 C.F.R. part 46 does provide for general duties that would apply to all licensees, including Dealers. See, for example, 7 U.S.C. § 499b, which describes “Unfair Conduct;” 7 C.F.R. §§ 46.14 (“General”), 46.15 (“Documents to be Preserved”), 46.16 (“Method of Preservation or Storage of Records”), 46.18 (“Record of Produce Received”), 46.19 (“Sales Tickets”), 46.20 (“Lot Numbers”), 46.21 (“Returns, Rejections, or Credit Memorandum on Sales”), 46.22 (“Accounting for Dumped Produce”), 46.25 (“Auction

Section makes it the duty of the Dealer to have Produce that is damaged, or in a deteriorated condition, inspected within eight working hours of receipt of notice of arrival and give notice of any rejection to the Shipper or the seller's representative within three hours after the inspection report is concluded.¹³⁰ He must forward a copy of the inspection certificate to the Shipper within twenty-four hours of receipt.¹³¹ Then, he must market any portion of the product that is marketable as soon as practicable.¹³² Further, the DRC Trading Rules place duties on the Dealer to provide for proper loading and care of Produce either on a truck or otherwise while in Dealer's possession.¹³³

PACA Regs. Section 46.28 and DRC Trading Standards Section 11 provide for the duties of a Broker: "The function of a broker is to facilitate good faith negotiations between parties . . . duty of the broker to fully inform the parties concerning all proposed terms and conditions of the proposed contract."¹³⁴ Also, "[a]fter all parties agree on the terms and contract is effected, the broker shall prepare in writing and deliver promptly to all parties a properly executed confirmation or memorandum of sale . . . including any express agreement as to time when payment is due."¹³⁵ These confirmations must also expressly state whom the Broker represents, and if it does not so state, then the Broker shall be assumed to have been engaged by the buyer.¹³⁶ Section 11 also specifies many other important details that would normally be expressed in written contracts, such as the limitation that he not employ other Brokers for the transaction without prior consent of his principal,¹³⁷ the duty to itemize all monies managed for his principal,¹³⁸ the fact that normally a Broker does not act as a guarantor of payment,¹³⁹ his duties where he acts in a dual capacity,¹⁴⁰ and his authority and/or duty to file claims with Carriers.¹⁴¹

Sales"), 46.29 ("Duties of Licensees"); and DRC TRADING STANDARDS, *supra* note 11, §§ 3-9, which also provide for most of these items and others as well, including General Records, Documents to be Preserved, Receiving Records, Sales Tickets/Invoices, Lot Numbers, Returns, Rejections, or Credit Memorandums on Sales, Accounting for Discarded Produce.

¹³⁰ DRC TRADING STANDARDS, *supra* note 11, § 10, ¶ 2(b)(i).

¹³¹ *Id.* ¶ 2(b)(ii).

¹³² *Id.* ¶ 2(b)(iii).

¹³³ DRC TRADING STANDARDS, *supra* note 11, § 10, ¶¶ 3-7. These rules provide, *inter alia*, for placement in a manner "to take advantage of [the package's] design strength to permit adequate bracing . . . and provide for sufficient air circulation." They also provide for proper air temperatures, cooling, and placement only with other compatible produce, which will not harm it.

¹³⁴ 7 C.F.R. § 46.28(a); DRC TRADING STANDARDS, *supra* note 11, § 11, ¶ 1.

¹³⁵ 7 C.F.R. § 46.28(a); DRC TRADING STANDARDS, *supra* note 11, § 11, ¶ 1.

¹³⁶ 7 C.F.R. § 46.28(a); DRC TRADING STANDARDS, *supra* note 11, § 11, ¶ 1.

¹³⁷ 7 C.F.R. § 46.28(b); DRC TRADING STANDARDS, *supra* note 11, § 11, ¶ 2.

¹³⁸ 7 C.F.R. § 46.28(b)-(c); DRC TRADING STANDARDS, *supra* note 11, § 11, ¶¶ 2-3.

¹³⁹ 7 C.F.R. § 46.28(c); DRC TRADING STANDARDS, *supra* note 11, § 11, ¶ 3.

¹⁴⁰ 7 C.F.R. § 46.28(d); DRC TRADING STANDARDS, *supra* note 11, § 11, ¶ 4.

¹⁴¹ 7 C.F.R. § 46.28(e); DRC TRADING STANDARDS, *supra* note 11, § 11, ¶ 5.

The duties of the Commission Merchant are specified in Section 12 of the DRC Trading Standards. A Commission Merchant, *inter alia*, may not sell outside his own market area without the consignor's prior consent.¹⁴² Further, he may not "pool" produce for sale without prior consent,¹⁴³ nor may he purchase or sell Produce to any business over which he has either direct or indirect control, except that he may purchase "remnants" as fair market value.¹⁴⁴ There are no particular duties specified for a Commission Merchant in the PACA Regs., although general duties would apply¹⁴⁵ as would other provisions pertaining to Brokers¹⁴⁶ and to all licensees generally.¹⁴⁷

The PACA Regs., as well as the DRC Trading Standards, recognize that "[t]he responsibilities of shippers vary with their contracts with growers."¹⁴⁸ The Shipper must maintain receiving and disposition records of the Produce.¹⁴⁹ Moreover, he is enjoined to enter into written agreements when a "joint account" transaction,¹⁵⁰ as well as when he handles "joint account" transactions for receiving parties.¹⁵¹ Obviously, the purpose of these required writings is to avoid confusion in the transaction.

Finally, both the PACA Regs. and the DRC Trading Rules provide for the duties of the Grower's Agent. The rules state that generally, such agreements should be in writing.¹⁵² Alternatively, the Agent may simply "have available a written statement describing the terms and conditions under which he will handle the produce of the grower . . . shall mail or deliver this statement to the grower."¹⁵³ The Grower is assumed to agree to the terms of their relationship if produce is delivered without any comment on the delivered terms.¹⁵⁴ "Unless a grower's agent is specifically authorized in his contract with the growers to use the services of brokers, commission merchants, joint partners, or auctions, he is not entitled to use these methods."¹⁵⁵ When a Grower's Agent acts in a dual capacity, he must "disclose his status in each transaction to all parties with whom

¹⁴² DRC TRADING STANDARDS, *supra* note 11, § 12, ¶ 1.

¹⁴³ *Id.*

¹⁴⁴ *Id.* ¶ 3. But this provision states that "remnants" may not exceed 5% of the original shipment.

¹⁴⁵ See *infra* notes 159–67.

¹⁴⁶ See *supra* notes 134–41 and accompanying text. See *infra* notes 242–61, pertaining to the rules and duties found in the DRC TRANSPORTATION STANDARDS, *supra* note 92, DRC GOODS INSPECTION GUIDELINES, *supra* note 93, and the GOOD ARRIVAL GUIDELINES, *supra* note 94.

¹⁴⁷ See *infra* notes 159–67.

¹⁴⁸ 7 C.F.R. § 46.31(a); DRC TRADING STANDARDS, *supra* note 11, § 13, ¶ 1.

¹⁴⁹ 7 C.F.R. § 46.31(b)–(c); DRC TRADING STANDARDS, *supra* note 11, § 13, ¶¶ 2–3.

¹⁵⁰ 7 C.F.R. § 46.31(b)–(c); DRC TRADING STANDARDS, *supra* note 11, § 13, ¶ 4.

¹⁵¹ 7 C.F.R. § 46.31(b)–(c); DRC TRADING STANDARDS, *supra* note 11, § 13, ¶ 5.

¹⁵² 7 C.F.R. § 46.31(b)–(c); DRC TRADING STANDARDS, *supra* note 11, § 14, ¶ 1. See, for example, *infra* Appendix A, for samples of such an agreement.

¹⁵³ 7 C.F.R. § 46.32(a); DRC TRADING STANDARDS, *supra* note 11, § 14, ¶ 1.

¹⁵⁴ 7 C.F.R. § 46.32(a); DRC TRADING STANDARDS, *supra* note 11, § 14, ¶ 1.

¹⁵⁵ 7 C.F.R. § 46.32(c); DRC TRADING STANDARDS, *supra* note 11, § 14, ¶ 3.

he is dealing.”¹⁵⁶ Not only can he not charge an extra fee when he purchases or sells Produce as a Shipper or Dealer,¹⁵⁷ but he also cannot negotiate where he, or the party with whom he is dealing, is subject to the direct or indirect control of any party to such transaction, other than his principal, without fully disclosing the circumstances to his principle and obtaining his specific prior approval.¹⁵⁸

2. General Code of Conduct

In addition to the individual duties specified for the various Players as shown above, both PACA and the DRC Trading Standards also establish some general standards of conduct by which all Players must abide. For example, 7 U.S.C. § 499b is entitled “Unfair Conduct,” and Section One of the DRC Trading Standards is entitled “General Rules of Conduct.” Each defines “unfair conduct,” which applies to all dealings, apparently regardless of whether such conduct occurs in conjunction with other licensees in the case of PACA,¹⁵⁹ and explicitly in dealing with both members and non-members in the case of the DRC.¹⁶⁰ Unfair conduct includes, amongst other things, “unfair, unreasonable, discriminatory, or deceptive practice in connection with the weighing, counting or in any way determining the quantity” of Produce,¹⁶¹ rejection or failure to deliver goods in conformity with the agreement;¹⁶² to fail to pick up or transport timely;¹⁶³ and for a Commission Merchant to discard, dump, or destroy Produce without reasonable cause.¹⁶⁴ In addition to these specific prohibitions, PACA and the DRC Trading Standards also prohibit broad categories of activities such as making false and misleading statements, refusing to accurately account and pay, failing to perform any specification of the transaction without reasonable cause,¹⁶⁵ as well as misrepresenting the origin or true grade, quality, quantity, size, weight, and condition of any Produce.¹⁶⁶ Finally, the DRC Trading Standards, although not PACA, prohibit issuing payment without sufficient funds to cover them.¹⁶⁷

¹⁵⁶ 7 C.F.R. § 46.32(e); DRC TRADING STANDARDS, *supra* note 11, § 14, ¶ 5.

¹⁵⁷ 7 C.F.R. § 46.32(e); DRC TRADING STANDARDS, *supra* note 11, § 14, ¶ 5.

¹⁵⁸ 7 C.F.R. § 46.32(e); DRC TRADING STANDARDS, *supra* note 11, § 14, ¶ 5.

¹⁵⁹ 7 U.S.C. § 499b.

¹⁶⁰ DRC TRADING STANDARDS, *supra* note 11, § 1. See also 7 U.S.C. § 499b, which demonstrates the efforts of the DRC to conform to the prior provisions of PACA where possible in order to avoid confusion and conflicts.

¹⁶¹ 7 U.S.C. § 499b(1); DRC TRADING STANDARDS, *supra* note 11, § 1, ¶ 1.

¹⁶² 7 U.S.C. § 499b(2); DRC TRADING STANDARDS, *supra* note 11, § 1, ¶ 2.

¹⁶³ DRC TRADING STANDARDS, *supra* note 11, § 1, ¶ 3; see 7 U.S.C. § 499b(2).

¹⁶⁴ 7 U.S.C. § 499b(3); DRC TRADING STANDARDS, *supra* note 11, § 1, ¶ 4.

¹⁶⁵ 7 U.S.C. § 499b(4); DRC TRADING STANDARDS, *supra* note 11, § 1, ¶ 5.

¹⁶⁶ 7 U.S.C. § 499b(5); DRC TRADING STANDARDS, *supra* note 11, § 1, ¶ 6.

¹⁶⁷ DRC TRADING STANDARDS, *supra* note 11, § 1, ¶ 7.

3. Risk-Related Trade Terms

One of the best aspects of both PACA and the DRC Trading Standards is that they clearly define many terms, which are critical to any Produce transaction (so that the parties do not have to do so). The PACA Regs., as well as the DRC Trading Standards, define many such terms, including “Acceptance,”¹⁶⁸ “Full Payment Promptly,”¹⁶⁹ and “Reasonable Time.”¹⁷⁰ Further, since neither the PACA Regs. nor the DRC use Incoterms provided by the International Chamber of Commerce,¹⁷¹ PACA Regs. Section 46.43 and DRC Trading Standards Section 19 define the key terms that are used to establish who bears the cost of carriage and risk of loss, the place of delivery, and point of inspection.¹⁷² Both sections contain over twenty different combinations of these elements, in comparison to the eleven found in Incoterms. In analyzing the differences in these various terms, one is first stricken by the multiple uses of the term “f.o.b.” under the PACA Regs. and the DRC Trading Standards, as opposed to the one use of that term under Incoterms.

First, and most importantly, the term “f.o.b.” is used under the PACA Regs. and DRC Trading Standard to apply to shipping other than by ship, whereas under Incoterms the term “FOB” is limited to mean only “free on board” a ship, where risk transfers literally at the moment the seller has placed the goods on board the ship.¹⁷³ In the PACA Regs. and the DRC Trading Standard there are six different combinations of delivery, which use the term “f.o.b.” For example, the PACA Regs. provide that the basic term “f.o.b.” followed by a location (such as Laredo, Texas) means that the produce quoted or sold is to be placed free on board the “boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition,” at which time the buyer assumes all liability.¹⁷⁴ The buyer may inspect the goods at the final destination to determine if the goods were delivered in “suitable shipping condition,” and if not, the buyer may reject or seek damages.¹⁷⁵ However, the term “suitable shipping condition” is further defined to mean a condition which, “if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination”¹⁷⁶

¹⁶⁸ 7 C.F.R. § 46.2(dd); DRC TRADING STANDARDS, *supra* note 11, § 19, ¶ 1.

¹⁶⁹ 7 C.F.R. § 46.2(aa); DRC TRADING STANDARDS, *supra* note 11, § 19, ¶ 10.

¹⁷⁰ 7 C.F.R. § 46.2(cc); DRC TRADING STANDARDS, *supra* note 11, § 19, ¶ 18.

¹⁷¹ See INT’L CHAMBER OF COMMERCE, INCOTERMS 2010 (2010).

¹⁷² 7 C.F.R. § 46.43; DRC TRADING STANDARDS, *supra* note 11, § 19.

¹⁷³ INT’L CHAMBER OF COMMERCE, *supra* note 171. In the case of sales occurring during transport, “delivery” occurs upon seller “procuring” the goods. *Id.*

¹⁷⁴ 7 C.F.R. § 46.43(i).

¹⁷⁵ *Id.* See also 7 U.S.C. § 499e(b), which indicates that all common law remedies, including right to reject are preserved by PACA.

¹⁷⁶ 7 C.F.R. § 46.43(j). However, “if a good delivery standard for a commodity [such as lettuce, for example] is set forth in § 46.44, and that commodity at the contract destination contains deterioration in excess of any tolerance provided therein, it will be considered abnormally deteriorated.” *Id.*

The DRC Trading Standard replicates these definitions,¹⁷⁷ although the standards explain the term “suitable shipping condition” in greater detail.¹⁷⁸ The term “f.o.b. acceptance” means “that the buyer accepts the produce at shipping point and has no right of rejection.”¹⁷⁹ If the goods were not in suitable shipping condition, then the buyer’s sole remedy is for damages and not for rejection.¹⁸⁰ Both the PACA Regs. and the DRC Trading Standard also add a similar term, “f.o.b. acceptance final,” which deletes the application of the term “suitable shipping condition,” thereby rendering that latter term irrelevant to performance of the contract.¹⁸¹ Rejection is still not an available remedy for breach.¹⁸² The term “f.o.b. inspection and acceptance arrival” means that the Produce is placed on the transport by the seller at the shipping point so that the buyer bears all cost of transportation, but the seller continues to bear the risks of transport not caused by seller.¹⁸³ Further, both sets of rules provide for the term “f.o.b. sale at delivered price,” which means the same as f.o.b., except the seller bears the transport charges from the shipping point to the destination.¹⁸⁴

Both PACA Regs. and the DRC Trading Standards allow for shipment “f.a.s.,” which means that the seller delivers the goods alongside a “steamer” at which point the buyer assumes all risk and costs.¹⁸⁵ Finally, the PACA Regs., but not the DRC Trading Standard, defines the term “f.o.b. steamer,” which is f.o.b., but applies only to shipment by ships or steamers.¹⁸⁶ It is not clear why this term exists since the basic term “f.o.b.” used in the PACA Regs., like the DRC Trading Standards, is defined to include shipment by “boat.”¹⁸⁷

The PACA Regs. and the DRC Trading Standards also both employ the terms “c.a.f.,” “c.a.c.,” and “c.i.f.”¹⁸⁸ Each provides that “c.a.f” means “f.o.b.,” except that the selling price includes all freight charges to destination.¹⁸⁹ “C.a.c.” also means “f.o.b.,” except that the selling price shall include both all freight as well as refrigeration and heating charges to the destination point.¹⁹⁰ “C.i.f.”

¹⁷⁷ DRC TRADING STANDARDS, *supra* note 11, § 19, ¶ 24 (“Suitable Shipping Condition”); § 20, ¶ 11 (“Good Delivery”).

¹⁷⁸ Compare DRC TRADING STANDARDS, *supra* note 11, §§ 19–20, with 7 C.F.R. § 46.43(k).

¹⁷⁹ 7 C.F.R. § 46.43(f); DRC TRADING STANDARDS, *supra* note 11, § 20, ¶ 6.

¹⁸⁰ 7 C.F.R. § 46.43(f); DRC TRADING STANDARDS, *supra* note 11, § 20, ¶ 6.

¹⁸¹ 7 C.F.R. § 46.43(m); DRC TRADING STANDARDS, *supra* note 11, § 20, ¶ 7.

¹⁸² 7 C.F.R. § 46.43(m); DRC TRADING STANDARDS, *supra* note 11, § 20, ¶ 7.

¹⁸³ 7 C.F.R. § 46.43(dd); DRC TRADING STANDARDS, *supra* note 11, § 20, ¶ 8.

¹⁸⁴ 7 C.F.R. § 46.43(ee); DRC TRADING STANDARDS, *supra* note 11, § 20, ¶ 9.

¹⁸⁵ 7 C.F.R. § 46.43(o); DRC TRADING STANDARDS, *supra* note 11, § 20, ¶ 4.

¹⁸⁶ 7 C.F.R. § 46.43(n); DRC TRADING STANDARDS, *supra* note 11, § 20, ¶ 10.

¹⁸⁷ See *supra* note 124 and accompanying text. See also 7 U.S.C. §499(f); 7 C.F.R.

§ 47.6(b).

¹⁸⁸ 7 C.F.R. § 46.43(v); DRC TRADING STANDARDS, *supra* note 11, § 20, ¶ 1.

¹⁸⁹ 7 C.F.R. § 46.43(v); DRC TRADING STANDARDS, *supra* note 11, § 20, ¶ 1.

¹⁹⁰ 7 C.F.R. § 46.43(v); DRC TRADING STANDARDS, *supra* note 11, § 20, ¶ 1.

means “f.o.b.,” except the selling price includes all insurance, freight, and refrigeration and heating charges to the point of destination.¹⁹¹

Finally, both sets of rules finesse the differences in the “D” Group of Incoterms, specifically the terms “DAT” (delivered at terminal),¹⁹² “DAP” (delivered at place), and “DDP” (delivered duties paid)¹⁹³ by subsuming them all into one term entitled “delivered” or “delivered sale.”¹⁹⁴ That terms simply means that “the produce is to be delivered by the seller on board car, or truck or on dock if delivered by boat, at the market in which the buyer is located, or at such other market as is agreed upon, free of any or all charges for transportation or protective service.”¹⁹⁵ The seller also assumes all risk of loss and damage in transit not caused by buyer.¹⁹⁶ However, it is important to note that this term does not address the issue of payment of duties as does Incoterms. Under all Incoterms, except DDP, the buyer is responsible for the payment of duties. Further, the term “delivered” or “delivered sale” specifically states that delivery is complete “on board” car or truck.¹⁹⁷ Similarly, delivery under Incoterms “DAP” and “DDP” is complete when the goods are placed at buyer’s disposal, ready for unloading (and still on board the arriving vehicle).¹⁹⁸ Delivery under Incoterms “DAT,” however, is complete only upon unloading of the goods from the arriving vehicle and placement at Buyer’s disposal at a specified location.¹⁹⁹ Further, the term “delivered” or “delivered sale” in the PACA Regs. and the DRC Trading Standards provides only for delivery on the dock at point of destination,²⁰⁰ which is the equivalent of the old “DEQ” (delivery ex quay) under earlier editions of Incoterms, and closest to the current Incoterms DAT.²⁰¹ The term “delivered” or “delivered sale” does not specifically provide for the alternative of delivery “on ship” at point of destination, although other “market(s)” can be agreed upon and specified,²⁰² but a “ship” is not a “market” and therefore the alternative of delivery on the ship does not easily present itself under the PACA Regs. and the DRC Trading Standards.

Interestingly, neither the PACA Regs. nor the DRC Trading Standards provide any clear equivalents to any of the “C Group” of Incoterms, specifically the terms “CFR” (cost and freight to point of destination), “CIF” (cost, insurance,

¹⁹¹ 7 C.F.R. § 46.43(v); DRC TRADING STANDARDS, *supra* note 11, § 20, ¶ 1.

¹⁹² INT’L CHAMBER OF COMMERCE, *supra* note 171.

¹⁹³ *Id.* Duties are paid by Seller and are typically reflected in the price charged to Buyer. *Id.*

¹⁹⁴ 7 C.F.R. § 46.43(p); DRC TRADING STANDARDS, *supra* note 11, § 20, ¶ 3.

¹⁹⁵ 7 C.F.R. § 46.43(p); DRC TRADING STANDARDS, *supra* note 11, § 20, ¶ 3.

¹⁹⁶ 7 C.F.R. § 46.43(p); DRC TRADING STANDARDS, *supra* note 11, § 20, ¶ 3.

¹⁹⁷ 7 C.F.R. § 46.43(p); DRC TRADING STANDARDS, *supra* note 11, § 20, ¶ 3.

¹⁹⁸ INT’L CHAMBER OF COMMERCE, *supra* note 171.

¹⁹⁹ *Id.*

²⁰⁰ 7 C.F.R. § 46.43(p); DRC TRADING STANDARDS, *supra* note 11, § 20, ¶ 3.

²⁰¹ INT’L CHAMBER OF COMMERCE, *supra* note 171.

²⁰² 7 C.F.R. § 46.43(p); DRC TRADING STANDARDS, *supra* note 11, § 20, ¶ 3.

and freight to point of destination), “CPT” (carriage paid to destination), and “CIP” (carriage and insurance paid to destination).²⁰³

Also, both the PACA Regs. and the DRC Trading Standards provide for various timing alternatives for inspections, none of which are recognized in Incoterms. Thus, both sections allow for “purchase after inspection.”²⁰⁴ This term means that there is no purchase until after inspection or opportunity to inspect, and the buyer waives both the right of rejection and all warranties as to quality or condition, except those expressly made by seller.²⁰⁵ The term “shipping-point inspection” requires the seller to obtain federal or “federal-state,” or mutually agreed private, inspections showing compliance.²⁰⁶ Here, the seller assumes the risks if the certification is incorrect.²⁰⁷ Contrarily, the terms “shipping-point inspection final” or “inspection final” mean the same, except the buyer assumes the risk of incorrect inspection certification and is without recourse for failure of the goods to comply.²⁰⁸ The PACA Regs. “subject approval Government inspection”²⁰⁹ and DRC Trading Standards “subject approval recognized inspection”²¹⁰ are similar and mean the same thing as “shipping-point inspection final,” except that here the buyer has a right to approve the inspection before being bound by it.²¹¹ Finally, both sets of rules define the term “price arrival,” which means the goods are to be shipped and the price will be determined upon arrival and after inspection.²¹² The DRC adds one permutation here, which is not found in the PACA Regs. Specifically, the DRC Trading Standards adds the term “open price,” meaning that the price will be determined only after the buyer has completed resales to third party customers.²¹³ The DRC Trading Standards also label this “price after sale.”²¹⁴

The PACA Regs. and the DRC Trading Standards also include terms pertaining to financial advances or guarantees. “Guaranteed advance” means that a party making an advance to a consignor is guaranteeing that the net proceeds due the consignor will equal at least the amount of the advance.²¹⁵ The terms “accommodation advance” or “regular advance” mean the opposite, and leave the consignor liable to return any amount by which the advance exceeds net proceeds finally due to the consignor.²¹⁶

²⁰³ INT’L CHAMBER OF COMMERCE, *supra* note 171.

²⁰⁴ 7 C.F.R. § 46.43(ff); DRC TRADING STANDARDS, *supra* note 11, § 20, ¶ 17.

²⁰⁵ 7 C.F.R. § 46.43(ff); DRC TRADING STANDARDS, *supra* note 11, § 20, ¶ 17.

²⁰⁶ 7 C.F.R. § 46.43(x); DRC TRADING STANDARDS, *supra* note 11, § 20, ¶ 18.

²⁰⁷ 7 C.F.R. § 46.43(x); DRC TRADING STANDARDS, *supra* note 11, § 20, ¶ 18.

²⁰⁸ 7 C.F.R. § 46.43(y); DRC TRADING STANDARDS, *supra* note 11, § 20, ¶ 19.

²⁰⁹ 7 C.F.R. § 46.43(z).

²¹⁰ DRC TRADING STANDARDS, *supra* note 11, § 20, ¶ 20.

²¹¹ See *supra* notes 208–09.

²¹² 7 C.F.R. § 46.43(cc); DRC TRADING STANDARDS, *supra* note 11, § 20, ¶ 14.

²¹³ DRC TRADING STANDARDS, *supra* note 11, § 20, ¶ 14.

²¹⁴ 7 C.F.R. § 46.43(cc); DRC TRADING STANDARDS, *supra* note 11, § 20, ¶ 15.

²¹⁵ 7 C.F.R. § 46.43(cc); DRC TRADING STANDARDS, *supra* note 11, § 20, ¶ 14.

²¹⁶ 7 C.F.R. § 46.43(bb); DRC TRADING STANDARDS, *supra* note 11, § 19, ¶ 2.

The rules also provide terms pertaining to joint account transactions. “Joint Account – Split Above” indicates that the “receiving partner” will pay all costs and expenses of the joint venture, without recovering any loss from his partner, and will further immediately reimburse the partner any costs that partner has incurred.²¹⁷ However, upon sale of the Produce the costs will be deducted (and presumably reimbursed to the paying partner, although this is not expressly provided), and the profits divided as agreed.²¹⁸

There are many other terms in the PACA Regs. that do not appear in the DRC Trading Standards. One such term is “today’s shipment” or shipment on a specified date, which takes different meanings depending on the mode of transport used: a) when the goods are to be moved by train, the produce shall be “under billing” by the transportation company on the applicable date in time to be picked up by a train scheduled to move that days’ loadings from the shipping point; b) when the goods are to be moved by boat, they must be alongside ship and be under billing in time to be both loaded and shipped on a boat scheduled to leave before midnight on the applicable day; or c) in conjunction with transportation by truck, the produce both shall be loaded and shall actually begin movement from the shipping point on the applicable day.²¹⁹ “Tomorrow’s shipment” and “immediate shipment” both mean the same as “today’s shipment,” except the goods will move 24 hours later.²²⁰ “Quick shipment” means within 48 hours after the time that would apply to “today’s shipment.”²²¹ “Prompt shipment” means a shipment with 72 hours of the date that would apply to “today’s shipment.”²²² “Shipment first part of the week” or “shipment early part of the week” means transport as provided under “today’s shipment,” but no later than Monday or Tuesday of the week specified.²²³ “Shipment middle of the week”²²⁴ means the same as “shipment first part of the week,” except the shipment must be under billing and scheduled to leave on Wednesday or Thursday of the specified week. “Shipment last of the week” or “shipment latter part of week” simply substitutes Friday and Saturday of the specified week for the dates applicable under the previous terms.²²⁵ Finally, “shipment as soon as possible” or “shipment as soon as car (truck) can be secured” means that the exact date of shipping is uncertain, but the seller will make it within a reasonable time, but also granting the buyer the right to cancel anytime after seven days if the notice to cancel is received by the seller before shipment is made.²²⁶

²¹⁷ 7 C.F.R. § 46.43(bb); DRC TRADING STANDARDS, *supra* note 11, § 19, ¶ 13.

²¹⁸ 7 C.F.R. § 46.43(bb); DRC TRADING STANDARDS, *supra* note 11, § 19, ¶ 13.

²¹⁹ 7 C.F.R. § 46.43(a).

²²⁰ *Id.* § 46.43(b).

²²¹ *Id.* § 46.43(c).

²²² *Id.* § 46.43(d).

²²³ *Id.* § 46.43(e).

²²⁴ 7 C.F.R. § 46.43(f).

²²⁵ *Id.* § 46.43(g).

²²⁶ *Id.* § 46.43(h).

In addition, PACA Regs. include terms which apply to Produce already in transit when quoted, and which specify what portion of transport charges are to be paid by buyer. Thus, the terms “in transit,” “roller,” or “rolling car,” all mean that the car is “moving over a route in line of haul between the point of origin and the market in which delivery is to be made, and has been so moving since date of shipment, without any delay attributable to the shipper or his agent.”²²⁷ The definition further specifies that where the purchase is “f.o.b. (shipping point),” the buyer will pay only the lowest “*all rail*” freight charges applicable between shipping point and destination, provided that the buyer is not obligated for any “protective charges,” unless advised thereof in advance by seller.²²⁸ The terms “tramp car” and “tramp car sale” are similar to “in transit,” but indicate either that the shipment is “moving over a route out of line of haul with the market in which it is to be delivered, or in which it is being offered or quoted,” or that the goods are delayed somewhere.²²⁹ The definition divides costs in the same manner as in “in transit” sales.²³⁰ Likewise, the term “rolling acceptance” means that the buyer accepts goods in transit under the same terms as apply to “in transit” and “tramp car” purchases, except the buyer pays all costs of transportation from time of purchase (wherever the goods are located), has no recourse against the seller as long as the goods were in “suitable shipping condition” at the time of purchase, and buyer also waives any right to reject the goods on arrival.²³¹ “Rolling acceptance final” means the same as “rolling acceptance,” except that it appears that there is no remedy at all if, during shipment, the goods are no longer in “suitable shipping condition.”²³² The terms “track sale” or “sale on track” means “a sale of produce on track after transit and after inspection or opportunity for inspection by the buyer”²³³ Here, the buyer has waived his right of rejection, although he will have a “right of reparation” if, upon unloading, it is evident that portions of the goods which were not accessible to inspection are defective.²³⁴

In addition, the PACA Regs. have a few additional terms that apply mostly to specifications of quantities. Thus, “carload,” “carlot,” and “car” are a complex definition that determines minimum quantity based upon the carrier’s tariff schedule.²³⁵ The term “commercial unit” simply means a single shipment, which must be accepted or rejected in its entirety.²³⁶

227 *Id.* § 46.43(q).

228 *Id.*

229 7 C.F.R. § 46.43(r).

230 *See id.*

231 *Id.* § 46.43(s).

232 *Id.* § 46.43(t).

233 *Id.* § 46.43(u)(1).

234 7 C.F.R. § 46.43(u)(1–2).

235 *See id.* § 46.43(w).

236 *Id.* § 46.43(ii).

4. Payment

Both the PACA Regs. and the DRC provide for when payment must be made. The PACA Regs. provide for a “cash sale,” which means that the buyer must make payment within 24 hours of his acceptance of the goods.²³⁷ But where a “cash sale” is not a specified term of the transaction, then both the PACA Regs. and the DRC Trading Standards prescribe that full payment must be made “promptly.” Specifically, both the PACA Regs. and the DRC Standards say that it is “unfair conduct” to “fail or refuse truly and correctly to account and *make full payment promptly* in respect of any transaction in any such commodity to the person with whom such transaction is had”²³⁸ Of course, the term “full payment promptly” is not self-explanatory. Therefore, both the PACA Regs. and the DRC Trading Standards define that term extensively based on the particular circumstances of the transaction.

The PACA Regs. and the DRC Trading Standards are concise and specific as to these definitions of “Prompt Payment,” and they cannot be paraphrased better than merely quoting them. Thus, the PACA Regs. state:

Full payment promptly is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. ‘Full payment promptly,’ for the purpose of determining violations of the Act, means:

- (1) Payment of net proceeds for produce received on consignment or the pro-rata share of the net profits for the produce received on joint account, within 10 days after the date of final sale with respect to each shipment, or within 20 days from the date the goods are accepted at destination, whichever comes first;
- (2) Payment by growers, growers’ agents, or shippers of deficits on consignments or joint account transactions, within 10 days after the day on which the accounting is received;
- (3) Payment of the purchase price, brokerage, and other expenses to buying brokers who pay for the produce, within 10 days after the day on which the broker’s invoice is received by the buyer;
- (4) Payment of brokerage earned and other expenses in connection with produce purchased or sold, within 10 days

²³⁷ *Id.* § 46.43(hh).

²³⁸ 7 U.S.C. § 499b(4); DRC TRADING STANDARDS, *supra* note 11, § 1, ¶ 5 (emphasis added).

after the day on which the broker's invoice is received by the principal;

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

(6) Payment to growers, growers' agents, or shipper by terminal market agents or brokers, who are selling for the account of a grower, grower's agent, or shipper and are authorized to collect from the buyer or receiver, within 5 days after the agent or broker receives payment from the buyer or receiver;

(7) Payment to the principal, within 10 days after receipt, of net proceeds realized from a carrier claim in connection with a consignment transaction or, in connection with a joint account transaction, payment to the joint account partners of their share of the joint account net proceeds realized from a carrier claim;

(8) Payment by growers' agents or shippers who distribute individual lots of produce for or on behalf of others, within 30 days after receipt of the goods from the principal for sale or within 5 days after the date the agent receives payment for the goods, whichever comes first.

(9) Whenever a grower's agent or shipper harvests, packs, or distributes entire crops or multiple lots therefrom for or on behalf of others, payment for the initial shipment shall be made within 30 days after receipt of the goods for sale or within 5 days after the date the agent receives payment for the goods, whichever comes first. Payment for subsequent shipments shall be made at 10-day intervals from the date of the accounting for the initial shipment or within 5 days after the date the agent receives payment for the goods, whichever comes first, and final payment for the seasons shall be made to each principal within 30 days from the date the agent receives the last shipment for the season from that principal.²³⁹

The DRC Trading Standards are virtually identical to this point.²⁴⁰ Thereafter, subsections (10) and (11) of the PACA Regs. and the DRC Trading Standards continue with similar, but not identical language. In effect, subsection (10) states that in transactions that diverge from the terms above, payment is due

²³⁹ See 7 C.F.R. § 46.2(aa)(1)–(9).

²⁴⁰ See DRC TRADING STANDARDS, *supra* note 11, § 19, ¶¶ 10(1)–(9).

within 20 days after the date of acceptance of the shipment.²⁴¹ Subsection (11) then provides for the opportunity for the parties to draft explicit payment provisions in writing, although the party who relies on such a provision has the burden of proving its existence.²⁴² Amongst other things, this right includes the right to require cash payment.²⁴³

In summary, the Payment provisions of PACA Regs. and the DRC Trading Standards provide for most circumstances, and thereby eliminate any need for the parties to specify payment provisions in the terms of the agreement. Like the other provisions of the PACA Regs. and the DRC Trading Standards, these rules help streamline and facilitate transactions while still providing clarity and certainty.

5. Transportation Standards

The DRC Trading Standards also incorporate by reference several other sets of rules and regulations, which govern Produce Transactions, but which are not covered in PACA. One of these is the DRC Transportation Standards.²⁴⁴ These specify the general expectations, rights, and duties of all the parties involved in transporting Produce, including those of Shippers, receivers, Carriers, and intermediaries.²⁴⁵ These include financial responsibilities.²⁴⁶ Then, they specifically address in more detail further rights and duties of “Intermediaries,” such as the Broker and the Freight contractor,²⁴⁷ the Shipper,²⁴⁸ and the “Receiver” of Produce.²⁴⁹ They also lay out the requirements for Carriers to qualify as such, as well as their required licensing and equipment standards.²⁵⁰ They also list certain warranties imputed to the Carrier on which other parties may rely.²⁵¹ Sections Seven, Eight, and Nine define in great detail the duties and responsibilities of the Carrier, its Operator, the Shipper, and the Receiver in loading, transporting, and unloading the goods.²⁵² These include many details, such as the duties of timely delivery, inspection, mitigation of damages, payment, payment for warehousing Produce, care of the Produce in transit, and management

²⁴¹ 7 C.F.R. § 46.2(aa)(10); DRC TRADING STANDARDS, *supra* note 11, § 19, ¶ 10(10).

²⁴² 7 C.F.R. § 46.2(aa)(11); DRC TRADING STANDARDS, *supra* note 11, § 19, ¶ 10(11).

²⁴³ 7 C.F.R. § 46.2(aa)(11); DRC TRADING STANDARDS, *supra* note 11, § 19, ¶ 10(11).

²⁴⁴ See DRC TRANSPORTATION STANDARDS, *supra* note 92.

²⁴⁵ See *id.* § 1.

²⁴⁶ See *id.* § 1, ¶ 4.

²⁴⁷ See *id.* § 3.

²⁴⁸ See *id.* § 5.

²⁴⁹ See DRC TRANSPORTATION STANDARDS, *supra* note 92, § 6.

²⁵⁰ See *id.* § 4.

²⁵¹ See *id.* § 4, ¶ 9.

²⁵² See *id.* §§ 7–9, 12.

of “pooled” goods.²⁵³ Further, the DRC Transportation Standards provide for making claims for late delivery, damaged goods, and other losses.²⁵⁴ Section Eleven provides that any “Special Insurance” must be paid by the party ordering the coverage.²⁵⁵ Finally, recognizing that the DRC Transportation Standards specify that transportation and carriage agreements historically are often undocumented beyond a Bill of Lading,²⁵⁶ they attach several Appendices that provide forms for agreements and documentation, including Drivers’ Receipts, Carriage Contracts, Broker-Intermediary Load Confirmation, as well as Good Temperature Guidelines, Good Transit Time Guidelines, and a form for a Shipper’s Report.

6. Goods Inspection and Goods Arrival Guidelines

In addition to the DRC Trading Standards and the DRC Transportation Standards, the DRC has also promulgated the DRC Good Inspection Guidelines²⁵⁷ and the DRC Good Arrival Guidelines.²⁵⁸ These are incorporated by reference into the DRC Trading Standards.²⁵⁹ The former are very basic, and simply provide that any inspector agreed to by the parties will be sufficient, but that government inspectors are preferred.²⁶⁰ Further, they provide for Inspection Standards as well as the proper methods of documenting inspections.²⁶¹ The latter provide for the standards and required quality of Produce at delivery, specifying these requirements for dozens of different products.²⁶² All of the above standards and requirements apply to any Produce transaction unless the parties expressly agree to the contrary.²⁶³

B. Liability and Dispute Resolution

Not only do the various PACA and DRC rules and regulations establish the above, and other, standards, requirements, and duties in a transaction, but they also clearly establish that each of the Players in these transactions is at risk for loss of his membership in the DRC, and/or his PACA License, if he violates them.²⁶⁴ In addition, he has, amongst other things, monetary liability for failure to

²⁵³ *See id.*

²⁵⁴ *See* DRC TRANSPORTATION STANDARDS, *supra* note 92, § 10.

²⁵⁵ *Id.* § 11

²⁵⁶ *See id.* § 2.

²⁵⁷ *See* DRC GOODS INSPECTION GUIDELINES, *supra* note 93.

²⁵⁸ *See* DRC GOODS ARRIVAL GUIDELINES, *supra* note 94.

²⁵⁹ *See* DRC TRADING STANDARDS, *supra* note 11, §§ 16–17.

²⁶⁰ *See* DRC GOODS INSPECTION GUIDELINES, *supra* note 93.

²⁶¹ *See id.*

²⁶² *See* DRC GOODS ARRIVAL GUIDELINES, *supra* note 94.

²⁶³ *See id.*

²⁶⁴ *See* 7 U.S.C. § 499h; Webber, *supra* note 3.

comply with these standards, requirements, and duties. However, the liability and dispute resolution provisions of PACA and the DRC Dispute Rules and regulations operate quite differently, and therefore each will be discussed separately.

1. The DRC

In a general provision at the beginning of the DRC Trading Standards, liability for failure to comply is stated to flow towards any persons “injured thereby.”²⁶⁵ Further, the liability of a Grower’s Agent is specifically stated to include liability for any damage caused by his negligence, as well as his failure to perform any specification.²⁶⁶ Further, Section 15 provides for liability in the event of wrongful conversion of any monies.²⁶⁷

This liability is reinforced by very strong and detailed DRC Mediation and Arbitration Rules (DRC Dispute Rules).²⁶⁸ The DRC Dispute Rules expressly provide that their application is a condition to membership of any DRC member.²⁶⁹ By joining the DRC, all members agree that “any dispute, controversy or claim with another member . . . arising out of or in connection with any transaction involving fresh fruits and vegetables . . . shall be resolved *exclusively* in accordance with these Rules”²⁷⁰ However, the DRC Dispute Rules specifically state that all rights of any member to prevent dissipation of assets in a “statutory trust”²⁷¹ existing under PACA may be reserved, so that those rights are not lost by virtue of taking action under the DRC Dispute Rules.²⁷² In addition, each party retains its complete rights to “pursue a debtor/member under any insolvency legislation”²⁷³ Finally, while a party may seek interim injunctive relief from the DRC arbitrator,²⁷⁴ he also has the right to seek such *interim* relief from a court of competent jurisdiction.²⁷⁵ Thus, it seems clear that a party may not seek more than interim relief from any judicial court. This is particularly interesting in light of the fact that where the claim is less than U.S. \$50,000, a litigant may seek both interim and long-term equitable or injunctive relief from the arbitrator himself, but apparently can only seek interim injunctive relief where the claim is for U.S. \$50,000 or more.²⁷⁶

²⁶⁵ See DRC TRADING STANDARDS, *supra* note 11, § 2, ¶ 1.

²⁶⁶ *Id.* § 14, ¶ 6.

²⁶⁷ *Id.* § 15.

²⁶⁸ See DRC DISPUTE RULES, *supra* note 95.

²⁶⁹ *Id.* art. 2(1).

²⁷⁰ See *id.* art. 2(2)–(3) (emphasis added).

²⁷¹ See *infra* notes 334–38 and accompanying text.

²⁷² See DRC DISPUTE RULES, *supra* note 95, art. 2(4).

²⁷³ See *id.*

²⁷⁴ See *infra* notes 288–97 and accompanying text.

²⁷⁵ See DRC DISPUTE RULES, *supra* note 95, art. 2(4).

²⁷⁶ See *id.* arts. 48, 78.

The DRC Dispute Rules specify claims limitations periods of nine months, which require any injured party to give notice to the DRC of any claim against another party within that time (unless otherwise agreed) after which no claim may be brought.²⁷⁷ The DRC Dispute Rules also provide procedures for giving notices of dispute²⁷⁸ and require an attempt at informal consultation to attempt to resolve the dispute.²⁷⁹ Further, the DRC Dispute Rules provide the details of all proceedings for formal mediation²⁸⁰ and arbitration.²⁸¹ In cases where the contested amount is less than U.S. \$50,000, the arbitrator is required to issue the award no later than thirty days after the final exchange of all submissions in the case.²⁸² However, in cases where the amount at issue is U.S. \$50,000 or more, or where the amount at issue is unspecified, there is no similar deadline for the issuance of the award.²⁸³ The DRC maintains a “multinational panel of arbitrators experienced in resolving produce disputes,”²⁸⁴ which the DRC makes available to the parties. However, there is no requirement that the parties utilize that panel of arbitrators. Nevertheless, if the parties cannot agree on an arbitrator, or the manner in which to select one, then the DRC will appoint the arbitrator(s).²⁸⁵ All arbitration awards are decided “in accordance with the terms of the agreement of the parties and the Trading Standards, the Transportation Standards, the Rules and Regulations, and the Policies of the [DRC].”²⁸⁶ Such arbitrations are final and binding upon the parties,²⁸⁷ and the parties undertake to carry out any such award without delay.²⁸⁸

The DRC Dispute Rules not only allow monetary awards, but also specify that the arbitrator has discretion to “determine liability for costs” and to “apportion costs” between the parties.²⁸⁹ For claims less than U.S. \$50,000, the parties must bear their own costs of “legal and other representation.”²⁹⁰ For claims of U.S. \$50,000 or more (and claims for unspecified amounts), the term “costs” includes “legal and other representation” incurred by the prevailing party.²⁹¹ This increases the risks for the litigating parties and, in turn, undoubtedly

²⁷⁷ See *id.* art. 4(1).

²⁷⁸ *Id.* art. 9.

²⁷⁹ *Id.* art. 11.

²⁸⁰ See DRC DISPUTE RULES, *supra* note 95, pt. III, § 1.

²⁸¹ See *id.* pt. III, § 2.

²⁸² *Id.* arts. 33, 51.

²⁸³ See *id.* arts. 57, 83.

²⁸⁴ *Id.* art. 37(1); see *id.* art. 61(1).

²⁸⁵ DRC DISPUTE RULES, *supra* note 95, art. 37(4); see *id.* art. 63(4). Article 62(1), as part of the set of Formal Rules and Procedures applicable to claims of \$50,000 or more (and unspecified amounts), allows the DRC to appoint three arbitrators if the “size, complexity or other circumstances of the case” so warrant.

²⁸⁶ DRC DISPUTE RULES, *supra* note 95, pt. III, § 3, art. 85(1).

²⁸⁷ *Id.* arts. 51(2), 84(1).

²⁸⁸ *Id.*

²⁸⁹ *Id.* arts. 53(1), 89(1).

²⁹⁰ *Id.* art. 53(2).

²⁹¹ *Id.* art. 89(1)(d).

encourages amicable resolution rather than litigation. In addition, the arbitrators are given another power not often found in any arbitral rules—the broad power to issue injunctions and other “equitable” relief. In disputes of less than U.S. \$50,000, the arbitrator may make “interim” orders such as for the protection and preservation of property,²⁹² extend or abridge time periods set by the DRC Dispute Rules,²⁹³ or order a party to deposit security for all or part of the amount in question and/or the other party’s expected costs and fees.²⁹⁴ Most broadly, the arbitrator is given the extremely broad power to “make an award ordering specific performance, rectification, injunctions and other equitable remedies.”²⁹⁵

For reasons that are not clear, these broad powers do not appear to be replicated in those portions of the DRC Dispute Rules that apply to cases where the disputed amount is U.S. \$50,000 or greater. There the arbitrator is given only “interim” powers to issue such equitable relief and monetary security.²⁹⁶ This discrepancy is not explained. Of course, one could argue that the provisions of Article 48 are also applicable to claims involving sums in excess of U.S. \$50,000 and that the “interim” provisions of Article 78 also apply to disputes of less than U.S. \$50,000. The problem is that Article 48 appears under Part III, Section 2, labeled “Arbitration: Expedited Rules and Procedures,” which is followed immediately by Article 33 pertaining to “Expedited Arbitration – Claims less than \$50,000.” Article 48 follows under Section 2 of Part III and appears to apply only to claims of less than U.S. \$50,000. On the other hand, Article 78 seems to be part of Part III, Section 3, labeled “Arbitration – Formal Rules and Procedure,” which is immediately followed by Article 57, labeled “Claims of \$50,000 or more and unspecified amounts.” Thus, Article 78 appears to fall under a section applicable only to claims of U.S. \$50,000 or more. Of course, one might argue that both provisions are intended to apply to all forms and types of arbitration; but, the DRC Dispute Rules are not clear in that regard.

In any case, it is not entirely clear how any such injunctive relief is enforced, and, indeed, that is one of the main reasons why the authority to issue injunctive and equitable relief is so unusual in arbitrations. Nevertheless, the DRC Dispute Rules do make it clear that “failure to abide by these Rules or any request or order by the Corporation (DRC), an arbitrator or a mediator . . . may give rise to discipline or expulsion from membership . . .”²⁹⁷

Finally, in order to facilitate clarity and consistency in its arbitral proceedings, the DRC makes available all of its arbitral decisions on its website.²⁹⁸ The decisions date from 2000 to present.

²⁹² DRC DISPUTE RULES, *supra* note 95, art. 48(1)(c).

²⁹³ *Id.* art. 48(1)(f).

²⁹⁴ *Id.* art. 48(1)(g).

²⁹⁵ *Id.* art. 48(1)(i).

²⁹⁶ *Id.* art. 78.

²⁹⁷ DRC DISPUTE RULES, *supra* note 95, art. 2(7).

²⁹⁸ See DRC, <http://www.fvdr.com/en/home.aspx> (last visited Sept. 18, 2013).

2. PACA

a. The General Regime

Although generally similar to the DRC Dispute Rules, PACA brings a few unique remedies to the table not found in the DRC. These PACA remedies will give the parties good reason to think carefully about the forum where they bring their claims. Like the DRC Dispute Rules, PACA also provides for full monetary relief for injured parties.²⁹⁹ However, unlike the DRC Dispute Rules, Mexicans seeking payment from an American pursuant to PACA are required to post a bond of double the amount of the claim before bringing a “formal” claim.³⁰⁰ This requirement places a serious burden on the Mexican, who then, is subject to paying the American’s costs and attorney’s fees if the former loses.³⁰¹ Another disadvantage of the PACA system is that PACA claims are not heard in non-appealable arbitration settings, as with the DRC regime, but instead are heard either in Administrative hearings before the U.S. Department of Agriculture or in U.S. Federal District Court, at the election of the claimant.³⁰² If heard in the District Court, the litigants will find themselves in a standard judicial environment, which will probably take longer to try than typical arbitrations, and in any case are appealable.³⁰³ Thus, such a proceeding is much longer and complex than arbitrated resolutions under the DRC Dispute Rules.

b. PACA Administrative Hearings

However, if the claimant brings the claim administratively under PACA, he may not be saving much time. PACA requires that such administrative actions be brought by filing a “complaint” with the Department within nine months after the cause of actions accrues.³⁰⁴ If a party files such a complaint with the Department, it will be treated at first as an “informal complaint,”³⁰⁵ which the Department will consider as a basis for either disciplinary action or an award of damages or both.³⁰⁶ But the matter will not proceed directly to administrative

²⁹⁹ See 7 U.S.C. § 499e.

³⁰⁰ See *id.* § 499g(c). However, Section 47.6 indicates that such bond is required only if the matter develops to the point where a “formal complaint” is filed. The provisions of the regulation dealing with informal complaints do not require such a bond. See 7 C.F.R. § 47.3.

³⁰¹ See *id.* § 499g(c).

³⁰² See 7 U.S.C. § 499e(b).

³⁰³ *Id.* §§ 499e, g.

³⁰⁴ *Id.* § 499f(a)(1); 7 C.F.R. § 47.3(a)(1). Note, however, that if no monetary relief is sought, the complaint may be filed no later than two years after the cause of action accrues, unless the violation is “flagrant” or “repeated.” 7 C.F.R. § 47.3(a)(1).

³⁰⁵ 7 C.F.R. § 47.3(a)(1).

³⁰⁶ *Id.*

hearing. Instead, the Department will investigate the claim.³⁰⁷ Only if the Department believes, after investigation, that the existence of a violation of the Act has been “substantiated,”³⁰⁸ and the situation “warrants,”³⁰⁹ and where suspension or revocation of a license may result,³¹⁰ the Department shall contact the person against whom the complaint is made “in an effort to effect an amicable or informal adjustment of the matter.”³¹¹ The offending party will then be given an opportunity to present his side of the case as well, including the right to attempt to come into compliance with the violated regulation.³¹²

Only if the above procedures fail to result in amicable resolution will the complaining party have a right to take the next step, which is to file a “formal complaint.”³¹³ Such a formal complaint must be filed within ninety days of notification of the right to proceed with a formal complaint.³¹⁴ Further, as noted above, if the Complainant is a non-resident of the United States, he must file a bond in double the amount of the claim.³¹⁵ However, pursuant to the authority granted to the Secretary of Agriculture in the PACA Regs., the Secretary may waive such bond requirements, if the complainant is a “resident of a country that permits the filing of a complaint in any administrative forum or its equivalent that is substantially similar” to PACA by a resident of the United States against a resident of the foreign country.³¹⁶ In fact, the Secretary has waived such bond requirements as to residents of Canada, which does offer such opportunities to U.S. residents.³¹⁷ Therefore, only Mexicans desiring to use the PACA formal administrative procedures must post the bond.

Once the administrative action is commenced, the PACA Regs. specify all the procedural rules for pleading, discovery, and trying the case.³¹⁸ Importantly, there will be an oral hearing before the “examiner” handling the case only where the amount in question (excluding attorney fees) exceeds U.S. \$30,000.³¹⁹ The record and proposed award and order will then be forwarded to the Secretary for his final review and formal ruling.³²⁰ The examiner may recommend, and the Secretary has the right to order, an amount of damages, plus

³⁰⁷ 7 U.S.C. § 499f(c)(1); 7 C.F.R. § 47.3(b).

³⁰⁸ 7 U.S.C. § 499f(c)(2).

³⁰⁹ 7 C.F.R. § 47.3(b)(2).

³¹⁰ *Id.*

³¹¹ *Id.* But it should be noted that this contact with the offending party need not occur if the acts were willful or where public health, interest, or safety required otherwise. *Id.*

³¹² *Id.*

³¹³ *Id.* § 47.6.

³¹⁴ 7 C.F.R. § 47.6(a).

³¹⁵ *Id.* § 47.6(b); *see also supra* text accompanying note 300.

³¹⁶ 7 C.F.R. § 47.6(b); 7 U.S.C. § 499f(e).

³¹⁷ Webber, *supra* note 3.

³¹⁸ 7 C.F.R. §§ 47.8 to .21.

³¹⁹ *Id.* § 47.15(a).

³²⁰ *Id.* §§ 47.21 to .46.

reasonable fees and expenses incurred.³²¹ Liability may be ordered for the “full amount of damages . . . sustained in consequence of such violation.”³²² The Secretary may also order the losing party satisfy his Order and Award by a date certain.³²³ In addition, the Secretary may suspend or revoke the defendant’s PACA license³²⁴ or he may assess civil penalties not in excess of U.S. \$2,000 for each violation in lieu of suspending or revoking the license.³²⁵

After the final Order of the Secretary, either party may appeal to the appropriate U.S. Federal District Court.³²⁶ If a party does not comply with the Order of the Secretary, an enforcement action may be brought in U.S. Federal District Court,³²⁷ and/or the Secretary may also suspend the PACA license of the dilatory party.³²⁸

As an alternative to claims brought by parties to a transaction discussed above, any State or Territorial officer, or any interested person may file a “notification” of a violation of PACA by any Commission Merchant, Dealer or Broker.³²⁹ Such notifications will be investigated by the Department.³³⁰ After investigation of the notification, if the Department so desires, it may issue a formal complaint,³³¹ and the case will be tried and a remedy may be awarded, all as discussed above.³³² However, there is no guarantee that any “complaint” will be issued, or a trial be held, as a result of such notifications.

c. The PACA Trust Regime

In addition to all of the above remedies, PACA supplies one other extra benefit. PACA makes it incumbent on all Commission Merchants, Dealers, and Brokers to hold all proceeds and receivables from the sale of Produce in Trust for the benefit of all unpaid suppliers, or sellers, or Agents until all of the latter have been paid.³³³ To benefit from this Trust, the seller, Agent, or Broker need only give notice to the Trustee within thirty calendar days after payment is overdue or dishonored.³³⁴ Alternatively, a PACA licensee may preserve his Trust rights simply by modifying his bills and invoices as specified in PACA Section 499e(c)(4). He simply needs to provide “information in sufficient detail to

³²¹ 7 U.S.C. § 499g.

³²² *Id.* § 499e(a).

³²³ *Id.* § 499g.

³²⁴ *Id.* § 499h(a).

³²⁵ *Id.* § 499h(e).

³²⁶ 7 U.S.C. § 499g(c).

³²⁷ *Id.* § 499g(b).

³²⁸ *Id.* § 499g(d).

³²⁹ *Id.* § 499f(b); 7 C.F.R. § 46.49.

³³⁰ 7 U.S.C. § 499f(c); 7 C.F.R. § 46.49.

³³¹ 7 U.S.C. § 499f(c)(2).

³³² See *supra* note 313–28 and accompanying text.

³³³ 7 U.S.C. § 499e(c); 7 C.F.R. § 46.46.

³³⁴ 7 U.S.C. § 499e(c); 7 C.F.R. § 46.46.

identify the transaction subject to the trust” and set forth a payment schedule, if different from that established by the Secretary in the PACA Regs.³³⁵ Further, he must simply include the following language on the invoice:

The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by Section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499e(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivable or proceeds from the sale of these commodities until full payment is received.³³⁶

The Federal Courts are explicitly given jurisdiction to hear actions for enforcement of Trust rights, as well as “actions by the Secretary [of the U.S.D.A] to prevent and restrain dissipation of the trust.”³³⁷

3. Filling in the Blanks: Application of the U.C.C. and the United Nations Convention on Contracts for the International Sale of Goods (CISG)

The PACA provisions and the DRC Dispute Rules cover a great deal of detail pertaining to sales of Produce into the United States from Mexico, as noted above. Even so they do not cover many issues that may arise, especially in the event of disputes. As such, one is left to wonder what law applies to “fill in the blanks” left under both regimes, especially in light of the fact that these transactions are international in nature. Fortunately, both have been interpreted clearly to resolve these issues. As will be seen, both sets of provisions have been interpreted to apply the U.C.C. and the CISG, almost interchangeably where the PACA provisions or the DRC Dispute Rules may be silent.

The drafters of the DRC had the foresight to state clearly:

In the interpretation of whether a party to a dispute has failed in its obligation for conform to the standards, and in calculating damages arising from any breach, the United States Uniform Commercial Code will be controlling, specifically; Article 1, Part 2, General Definitions and Principles of Interpretation; Article 2, Sales; Article 3, Negotiable Instruments; Article 5, Letters of Credit; and Article 7, Warehouse Receipts, Bills of Lading, and Other Documents of Title.³³⁸

³³⁵ 7 U.S.C. § 499e(c)(3)–(4).

³³⁶ *See id.* § 499e(4).

³³⁷ *Id.* § 499e(c)(5).

³³⁸ DRC TRADING STANDARDS, *supra* note 11, § 21.

To clarify further, the DRC Trading Rules go on to specify a reference to the Fourteenth Edition of the UCC, dated 1995.³³⁹ In addition, the DRC Trading Rules specify that “[a]n alternative to the U.C.C. is the United Nations Convention on Contracts for the International Sale of Goods.”³⁴⁰ Of course, the DRC Mediation and Arbitration Rules state that as is the case with most arbitrations, the parties can specify what law applies, and the arbitrator shall apply it to the extent recourse to that law is necessary.³⁴¹ But in all cases, the arbitrator must apply the Trading Standards,³⁴² and thus, the requirement that the U.C.C. applies. Further, the arbitrator must decide in accordance with the terms of the contract and “shall take into account usages of the trade applicable to the contract.”³⁴³ However, the specific rules listed above seem to make it clear that he must apply the U.C.C., or alternatively, the CISG. Practically speaking, however, the U.C.C. and the CISG do not have major differences in the area of sales, which is the only subject matter of the CISG. Thus, on issues of negotiable instruments, the arbitrator should apply Article 3 of the U.C.C., on issues pertaining to letters of credit he should apply the provisions of Article 5 of the U.C.C., and on the issues of warehouse receipts, bills of lading, and other documents of title, he should apply Article 7 of the U.C.C. As to definitions and sales (including remedies and calculation of damages), he should apply either the provisions of Article 1, Part 2 and Article 2, respectively, of the U.C.C., or he has the alternative ability to apply the applicable provisions of the CISG.

These rules have been applied on a fairly consistent basis in the arbitrations that have been decided by DRC arbitrators, even where one or more of the parties are not U.S. residents. Thus, the U.C.C. has been applied to resolve many issues. These include standards for notice of rejection by a receiver of Produce,³⁴⁴ formulating damages after calculating deductions,³⁴⁵ avoidance of accord and satisfaction where payment is received in a lockbox,³⁴⁶ application of the parol evidence rule to extrinsic evidence,³⁴⁷ and notice of defects.³⁴⁸ Similarly, the CISG has been applied to establish the duty to give timely notice that invoices are incorrect in order to preserve a right to relief,³⁴⁹ the Buyer’s duty to follow reasonable instructions from the Seller and his right to sell the goods for Seller’s account,³⁵⁰ and in two cases to establish a formula for calculation of damages where goods are nonconforming.³⁵¹

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ DRC DISPUTE RULES, *supra* note 95, arts. 49, ¶ 2; 85, ¶ 2.

³⁴² *Id.* arts. 49, ¶ 1; 85, ¶ 1.

³⁴³ *Id.* arts. 49, ¶ 3; 85, ¶ 3.

³⁴⁴ DRC File No. 9975, DRC (June 22, 2001).

³⁴⁵ *Id.*

³⁴⁶ DRC File No. 18159, DRC (Nov. 16, 2005).

³⁴⁷ DRC File No. 17182, DRC (Aug. 15, 2006).

³⁴⁸ DRC File No. 18227, DRC (July 19, 2006).

³⁴⁹ DRC File No. 12037, DRC (Nov. 4, 2002).

³⁵⁰ DRC File No. 12000, DRC (Mar. 13, 2003).

³⁵¹ *Id.*; DRC File No. 13145, DRC (July 22, 2003).

Finally, in addition to applying the U.C.C. and the CISG on a regular basis, DRC arbitrators have applied PACA rules (excluding the PACA Trust provisions),³⁵² administrative decisions from the U.S. Department of Agriculture,³⁵³ and U.S. case law from courts of general jurisdiction.³⁵⁴ This is consistent with the provisions in the DRC Mediation and Arbitration Rules, which give the arbitrator the right to select applicable law where various rules of the DRC regime, the U.C.C., and the CISG do not assist.³⁵⁵ After a thorough review of every arbitration decision rendered by the DRC through 2007, however, the author has not located a single decision that cited either Canadian or Mexican statutes or case authority. This would indicate that the CISG or U.S. law is usually considered to set the fair and applicable standards in the industry and that they can be relied upon by the parties, regardless of the nation of their residence.

In PACA cases, the U.C.C. is often cited and relied upon to supplement the provisions of PACA. Thus, courts have found that the U.C.C. should be applied to determine the duty of a party to object timely to incorrect invoices and confirmations of sales if that party desires to preserve relief therefrom,³⁵⁶ as well as how to calculate damages in the event one party attempts to “cover” his losses by purchasing substitute goods elsewhere.³⁵⁷ However, one must take care in applying the U.C.C. because courts have found that some aspects of the U.C.C. may not be applicable to PACA actions in certain limited circumstances. For example, courts have found that statutes of frauds found in a state’s U.C.C. are merely procedural and evidentiary in nature so as to preclude evidence of unwritten agreements to establish a contract in state courts.³⁵⁸ Not being substantive provisions, such statutes of frauds could not be used to object to a PACA reparation order that had arisen out of an oral agreement.³⁵⁹ While the U.C.C. is often applied to supplement the provisions of PACA, however, the author has been able to locate no decisions arising out of PACA cases that refer to the CISG.

³⁵² See, e.g., DRC File No. 10629, DRC (Feb. 22, 2002); DRC File No. 12187, DRC (Apr. 30, 2003).

³⁵³ See, e.g., DRC File No. 13116, DRC (Oct. 16, 2003); DRC File No. 9494, DRC (May 21, 2001).

³⁵⁴ See, e.g., DRC File No. 13116, DRC (Oct. 16, 2003).

³⁵⁵ See DRC DISPUTE RULES, *supra* note 95, arts. 49(2), 85(2).

³⁵⁶ See *Geneco Produce, Inc. v. Sol Group Marketing Company*, No. 04cv-8282 CJS, 2006 U.S. Dist. LEXIS 8351 (W.D.N.Y. 2006).

³⁵⁷ *Flood v. M.P. Clark, Inc.*, 319 F. Supp. 1043 (E.D. Pa. 1970).

³⁵⁸ *United Potato Co., Inc. v. Burghard & Sons, Inc.*, 18 F. Supp. 2d 894 (N.D. Ill. 1998).

³⁵⁹ *Id.*

4. Applicability of the DRC and PACA Provisions

Of course, the above DRC provisions, dispute resolution mechanisms, and remedies are available to parties only if both are members of the DRC,³⁶⁰ or if a non-member agrees to litigate under the DRC regime.³⁶¹ In addition, DRC members specifically retain their rights to sue non-members outside the DRC.³⁶² However, if both parties are DRC members, the parties are contractually bound to litigate all disputes using the DRC Dispute Rules,³⁶³ except they retain all their PACA Trust rights and can exercise those Trust rights outside the DRC.³⁶⁴

The PACA regime is applicable against everyone who holds a PACA license, which is anyone who deals in commercial quantities of Produce in the United States.³⁶⁵ This is true regardless of whether the other party, as a plaintiff, is licensed by PACA. Indeed, in defining “Unfair Conduct” that falls under the jurisdiction of PACA, the statute specifically provides that such “Unfair Conduct” may be in connection with either interstate or *foreign* commerce.³⁶⁶ Further, the statute also explicitly provides for actions brought by non-residents of the United States, although most must post a bond.³⁶⁷ And the provision on damages simply states that a licensed person violating the PACA Regs. will be liable for all consequential damages to “persons injured,” without limiting such “persons” to either other PACA licensees or even to U.S. residents.³⁶⁸ Thus, it seems clear that even foreigners who are not licensed by PACA, but who are dealing with someone licensed by PACA have “Trust” rights under the PACA regime and can enforce them.³⁶⁹

With the above in mind, Mexican Growers and other Mexicans involved in Produce trade with the United States have several choices in enforcing their agreements with Americans. If both parties are members of DRC, then the DRC rules apply in all respects. If the Mexican is not a member of the DRC, he may, but is not required to, enforce his rights under the DRC Dispute Rules. Alternatively, he can take action pursuant to the PACA regime against the American, who virtually by definition will be licensed by PACA. Finally, if time permits, the parties can enter into other agreements, which modify the terms and conditions of the transaction, although the licensed American cannot alter his *obligations* to the Mexican found in PACA.

As is obvious, the best solution for the American is that both he and the Mexican be members of the DRC so that they have simple and enforceable rules

³⁶⁰ DRC DISPUTE RULES, *supra* note 95, art. 2, § (1).

³⁶¹ *Id.* art. 3, § (1).

³⁶² *Id.* art. 2, § (5).

³⁶³ *Id.* §§ (1)–(3).

³⁶⁴ *Id.* § (4).

³⁶⁵ 7 U.S.C. § 499c(a).

³⁶⁶ *Id.* § 499b.

³⁶⁷ 7 U.S.C. § 499f(e); *see also supra* note 300 and accompanying text.

³⁶⁸ 7 U.S.C. § 499e(a).

³⁶⁹ *Id.* § 499e(c).

and mechanisms by which they can operate and enforce their rights. The worst case for the American is that the Mexican not be a DRC member. In that case, the American has no hold on the Mexican through the DRC, but retains all the American's obligations to the Mexican under PACA as a licensed party. The Mexican, on the other hand, has no definable duties to the American. Moreover, the terms and conditions of the transaction are ambiguous as the terms of PACA are not applicable to the Mexican. Thus, if the Mexican is not a DRC member, the American's next best choices are either, or both, a) to rely on the terms and conditions established in the CISG, and/or b) to formalize a contract with the Mexican that defines as fully as possible the terms and conditions of the transaction. To understand how this might work, we will next analyze the terms and conditions of CISG in the context of a Produce transaction between a Mexican Grower or Dealer and an American Buyer, Agent, or Broker.

5. Other Contractual Remedies and Dispute Resolution Regimes

Of course, in many cases the parties to a transaction may elect (knowingly or unknowingly) other dispute resolution regimes and other remedies than are specified either in PACA or the DRC rules. This appears to occur most frequently in the case of agency agreements, which as noted above are long-term agreements and are therefore written. However, in some cases the parties may simply rely on the terms and conditions of a simple PO as *supplemented* by the provisions of the CISG, which is applicable to all international sales of goods where the parties of contracting nations have not elected an alternative set of applicable remedies and terms.³⁷⁰ Both the United States and Mexico are contracting parties. Further, Produce is a "good."³⁷¹ Therefore, the CISG will be applicable to such agreements unless the parties elect to the contrary, as by electing to operate under the DRC regime. Below we will analyze each of these forms of agreements, which might be used in lieu of the DRC provisions, or either as a supplement to or in lieu of PACA provisions, described earlier.

a. Customized Written Agreements

In situations where the parties elect to draft written agreements, the parties may or may not specify what law applies and may even waive rights they would otherwise have under PACA and the DRC. The results may or may not be beneficial. The agency agreements in Appendices A-1, A-2, and A-3 represent

³⁷⁰ See United Nations Convention on Contracts for the International Sales of Goods arts. 1, 6, Nov. 2010, E.10.V.14 [hereinafter CISG], available at <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>.

³⁷¹ In DRC arbitrations, the parties regularly apply CISG, thereby acknowledging that Produce is a "good." See *supra* notes 338, 347-49 and accompanying text.

good examples of situations where the parties have elected to apply law and/or dispute mechanisms other than those provided by PACA or the DRC.

For example, in paragraph nine of Appendix A-1, the parties elect a dispute resolution regime exclusively in the form of arbitration according to the Commercial Arbitration Rules of the American Arbitration Association. Further, the agreement leaves open what law applies in interpreting and applying the agreement. The result is that the parties have waived any right to try their disputes either through use of the U.S. Federal District Court or the PACA administrative procedures under PACA, as set forth above.³⁷² Very arguably, the Grower's rights under the PACA Trust regime are thereby lost. However, it is unclear whether the Grower could still complain to the U.S. Department of Agriculture so as to put the Agent's PACA license in jeopardy with the Department. The risk of being unable to use the PACA dispute procedure may not be a terrible loss for the Mexican Grower, who would have to post a "double bond" with the Department to do so.³⁷³ Moreover, there may be considerable advantage to both parties in electing a relatively quick and non-appealable arbitration rather than the more complicated and lengthy PACA procedures described above. However, in agreeing to arbitration, the Grower may well be giving up his rights to use the PACA Trust regime mentioned earlier, which would be a significant disadvantage the impact of which may not be fully understood by the Grower.

In addition, by not specifying what law applies, the parties by default allow CISG to apply.³⁷⁴ Of course, it is not clear whether the parties have made this election knowingly, but the effect remains. Finally, it must be noted that the CISG "governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract."³⁷⁵ The CISG does *not* govern "the effect which the contract may have on the property in the goods sold."³⁷⁶ Therefore, the terms and conditions of any lien or security interest that may be taken by the Agent will be governed not by CISG, but by the laws of the nation where the lien or security interest is taken.³⁷⁷

The Agreement shown in Appendix A-2 offers another alternative type of arrangement. Paragraph 26.4 specifies that the laws of *both* countries apply and then delineates where each is applicable. On issues of interpretation, compliance, and/or judicial enforcement made in the United States, the Arizona State Courts in Nogales, Arizona and/or the Federal District Courts in Arizona shall have exclusive jurisdiction. Likewise, "for everything related to the interpretation of, compliance with, or judicial request of the obligations under this Agreement in the

³⁷² Such elections of dispute resolution mechanisms in contract are usually treated as exclusive and result in a waiver of the right to use any other forms of dispute resolution regimes. See American Arbitration Association, Commercial Arbitration Rules, § M1.

³⁷³ See *supra* note 298 and accompanying text.

³⁷⁴ CISG, *supra* note 369, arts. 1, 6.

³⁷⁵ *Id.* art. 4.

³⁷⁶ *Id.* art. (4)(b).

³⁷⁷ See *infra* app. A-1, ¶ 6, which provides for the Agent's right to obtain liens and security interests to secure repayment of any advances made to the Grower.

United Mexican States” will be heard in the Mexican courts in Nogales, Sonora.³⁷⁸ In other words, it is not clear at all what actions need to be brought in which country, and the parties appear to have a choice in that regard as long as they bring their actions in the limited venues indicated in the Agreement. The only exception to these venues applies to actions to enforce liens and security interests, which may be brought wherever necessary.³⁷⁹

With regard to choice of law matters, the Agreement is slightly clearer. It states that Arizona law will apply unless an action is brought in Mexico, in which case the law applicable to a venue in Nogales, Sonora will apply.³⁸⁰ This “choice of law” provision successfully eliminates the application of the CISG, by election of law.³⁸¹ Further, it appears to preserve the Grower’s rights against the Agent under the PACA Trust provisions discussed earlier.³⁸² However, the parties are left to the law of the venue as their choice of law, and therefore are simply in a position of competing to get to the courthouse in their respective jurisdictions. Even the first to file, however, may not have an advantage either as to applicable law or as to jurisdiction, since nothing prohibits the other party from filing in his own “home” venue.

Finally, Appendix A-3 provides a much simpler and more workable alternative. This Agreement provides that the law of Arizona applies to all matters and that the exclusive venues for all disputes are the State courts located in Nogales, Arizona, or the Arizona Federal District Courts.³⁸³ Clearly, however, if the Agent were to bring actions against collateral located in Mexico, that action would have to be brought in Mexico under the laws of Mexico applicable to that collateral.

Appendix A-3 also expressly provides that the Grower agrees to “waive or subordinate” his rights under the PACA Trust provisions “in favor of a financial institution,” if the same is required by the institution in order to provide financing for the Agent.³⁸⁴ While this language is not entirely clear as to whether this constitutes an absolute waiver or merely a duty to subordinate if required by Agent’s lender, the concept of such a waiver is addressed here as it is not in either of the other Appendices discussed above.

Of the above agreements, Appendix A-3 appears to be most favorable for the American. Appendix A-1 seems the clearest and, overall, the most favorable to the Mexican. Of course, many other variations of agreements are possible. However, the point is that, if both parties were members of the DRC, little of this would be necessary as the DRC establishes a very clear and fair regime that would render much of these agreements unnecessary. This should make it clear to Mexican participants that they certainly would be better off using the DRC regime

³⁷⁸ See *infra* app. A-2, ¶ 26.4.

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ CISG, *supra* note 369, art. 6.

³⁸² See *supra* notes 331–35 and accompanying text.

³⁸³ See *infra* app. A-3, ¶¶ 28–29.

³⁸⁴ See *infra* app. A-3, ¶ 11.

than the lopsided types of agreements discussed above. Moreover, even the American parties would be better off since the DRC regime seems eminently fair to both sides and provides for far quicker and more efficient dispute resolution than do any of the agreements in the Appendices to this article. In addition, the American should want the Mexican to be a member of the DRC for another reason: it would require the Mexican to bring disputes against the Agent (other than other the PACA Trust provisions, which are rights expressly reserved under the DRC regime³⁸⁵) only in the DRC and not in the more cumbersome and expensive procedures established through PACA.³⁸⁶ Thus, both parties would be better off if both simply were members of the DRC and subjected themselves to the efficient and fair dispute mechanisms of that organization, rather than the regime of PACA (applicable only to the American anyway), or even the customized provisions of written agreements such as those in the Appendices, which inevitably would involve complex, lengthy, and expensive court proceedings.

b. International Trade Centre Model Contract on the International Commercial Sale of Perishable Goods

The International Trade Centre (ITC) of the United Nations Center for Trade and Development (UNCTAD) also developed its own Model Contract on the International Commercial Sale of Perishable Goods (Model Contract),³⁸⁷ attached hereto as Appendix A-4. As one would expect, the ITC Model Contract utilizes the terms for payment and transfer of risk found in INCOTERMS.³⁸⁸ Further, it expressly provides that the CISG will apply as to any issues that are not considered in the Model Contract, so that the conditions of offer, sale, contract, and remedy found in CISG are incorporated into the Model Contract to supplement its terms.³⁸⁹ In addition, the Model Contract also incorporates the International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts.³⁹⁰ Importantly, the Model Contract also applies the “law applicable at Seller’s place of business through which this

³⁸⁵ See *supra* notes 331–34.

³⁸⁶ See *supra* notes 297–329 and accompanying text.

³⁸⁷ See U.N. CENTER FOR TRADE & DEV., INTERNATIONAL COMMERCIAL SALE OF PERISHABLE GOODS: MODEL CONTRACT AND USERS’ GUIDE, U.N. Doc. ITC/P34.E/TSS/FASS/99-IX (1999) [hereinafter ITC MODEL CONTRACT]; see also *infra* app. A-4.

³⁸⁸ See ITC MODEL CONTRACT, *supra* note 387, ¶ 3; INT’L CHAMBER OF COMMERCE, *supra* note 171.

³⁸⁹ See ITC MODEL CONTRACT, *supra* note 387, ¶ 14.

³⁹⁰ *Id.*; see INT’L INST. FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL PRODUCTS (2010), available at <http://www.unidroit.org/english/principles/contracts/main.htm>.

Contract is to be performed” to fill in any blanks not covered by any of the above.³⁹¹

The Model Contract is also very clear as to the procedures applicable to various alternative forms of payment available. Paragraph five of the Model Contract provides alternative methods of payment by “Payment In Advance,” “Payment By Documentary Collection,” “Payment By Irrevocable Documentary Credit,” “Payment Backed By Bank Guarantee,” or “Other Payment Arrangements.”³⁹² Where the second of these alternatives is to be used, the Model Contract specifies that the Rules of Documentary Collection of the International Chamber of Commerce apply.³⁹³ Where the third alternative is to be used, the Uniform Customs and Practice for Documentary Credits of the International Chamber Commerce will govern.³⁹⁴ And where the fourth alternative is used, the payment terms will be those stated in the Uniform Rules of Demand Guarantees published by the International Chamber of Commerce.³⁹⁵

Finally, the Model Contract specifies that all disputes will be arbitrated under the Rules of Arbitration of the International Chamber of Commerce.³⁹⁶ In the event that the claim exceeds one million U.S. dollars, the dispute will be resolved in the International Chamber of Commerce International Court of Arbitration.³⁹⁷

Thus, the Model Contract is precise, albeit one must almost be a lawyer to fully understand it. Nevertheless, parties who do not use it would be well advised to at least review it, or use it as a base from which to begin drafting a custom agreement if they choose not to utilize the DRC regime. It is clear and provides for most unforeseen circumstances through its reference to the various international conventions and rules cited above. Even if one did not fully understand those conventions and rules going in, one could at least reference them as needed and determine the validity of the respective positions of the parties. That is far better than having a contract that is vague, fails to cover important issues, or even worse, is internally inconsistent. Drafting a custom contract using the ITC Model Contract as a place to start would seem to be good practice in the context of international Produce sales transactions. At a minimum, it is a sound alternative and should not be dismissed out of hand.

V. CONCLUSION

The importation of Mexican Produce into the United States involves many different Players, the laws of two nations, and goods that are highly

³⁹¹ See ITC MODEL CONTRACT, *supra* note 387, ¶ 14.

³⁹² *Id.* ¶ 5.

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ See ITC MODEL CONTRACT, *supra* note 387, ¶ 15.

³⁹⁷ *Id.*

perishable and require efficient delivery to market. At first glance, it appears that very complex transactions are handled too informally, with almost no documentation beyond a PO and a BOL. The industry, however, has adapted well to the complexities that face it and has rendered many of the usual transactional formalities unnecessary. By working together for their common good, the members of the industry have developed rules and regulations that are well accepted amongst all the Players, as well as the mechanisms to enforce those rules and regulations. In this way, the industry has become able to manage these difficult transactions smoothly and efficiently, but almost completely without formal documentation. Each of the Players knows what is expected of them, as well as what they should expect of others. The result seems to be few surprises on a day-to-day basis.³⁹⁸ And when surprises or problems do occur, they can be resolved expeditiously pursuant to the DRC Mediation and Arbitration Rules and the PACA-sponsored mechanisms for dispute resolution. In particular, the DRC Dispute Rules are simple and efficient. They also provide a fair venue for dispute resolution for parties from all three of the NAFTA countries. Yet, Mexicans do not appear to be joining the DRC in the numbers that Americans and Canadians do. Therefore, the efficiency of the industry could be increased, rather substantially, if all parties in the Produce trade from all three countries became members of the DRC. Nevertheless, the industry has a strong start in this regard, and one can hope that the sound mechanisms inherent in the DRC rules will ultimately attract all players.

Another weak spot in the industry appears to be in situations where written contracts are drafted, which is usually where Growers and Agents have formed a long-term relationship. The author's review of the contracts, which he has seen, has led him to believe that those contracts are drafted in strong favor of the Agents, often in ways that probably are not obvious to Mexican Growers. That is understandable from the point of view of the Agents, who often double as the Growers' financiers. Nevertheless, especially where the Mexican Grower is not a member of the DRC and cannot rely on its rules and dispute mechanisms, Mexicans ought to take great care in these matters. To begin, they might consider available international model contracts and related legal rules and conventions that might help lead them to more balanced contracts.

In any case, it seems clear that the overall sophistication of the Produce industry working between the United States and Mexico is quite high and is rapidly evolving into a model for other businesses and fields. Other industries could learn much from the U.S.-Mexican Produce Industry.

³⁹⁸ Coogan, *supra* note 3.

APPENDIX A-1: MARKETING AGREEMENT

Marketing Agreement

This Agreement is entered into on _____ by and between the _____ ("Agent") and _____ ("Grower") whose address and designated representative are set forth in Exhibit A attached hereto.

Agent is in the business of handling, distributing and marketing high quality agricultural crops for fresh market consumption.

Grower is experienced in producing high quality crops in a good and farmer like manner, and has the exclusive right to farm on property located on acreage described in Exhibit A attached hereto.

Grower desires to have Agent act as its exclusive sales agent for the distribution and marketing of the ("Crop(s)") listed on Exhibit A attached hereto. Agent is willing to do so under the terms and conditions set forth herein.

Therefore, Grower and Agent agree, for valuable consideration and the mutual covenants contained herein, to the following:

- 1. Growing and Packing. Grower shall be responsible for the growing of the Crop in a manner best suited to producing the highest quality Crop, including using the appropriate methods of planting, irrigation, fertilization and cultivation. Grower agrees to take all precautions and actions necessary to maintain sanitary conditions in conducting its growing operations to prevent the Crop from being subject to contamination which could interfere with its marketability. From time to time, Agent may, but shall not be obligated to, provide advice to Grower regarding cultural practices, harvesting, packing or quality control issues. Grower however, shall remain solely responsible for its farming and packing operations and Agent shall not be liable for any advice given or not given to Grower. Agent shall not be responsible for, but when requested may purchase materials on behalf of Grower, and in any such instances, Agent shall be entitled to a ten percent (10%) handling charge above the cost of procurement. Material purchased by Grower shall be of like specifications and bear a label approved by the Agent. Grower shall be responsible for all materials while in its possession. Grower shall consult with Agent as to harvesting schedules and general farm practices, and shall promptly notify Agent of any situation that might interfere with Grower's ability to comply with its harvesting schedules, or which may affect the Crop, its quality and /or marketability. Both parties recognize that a high degree of coordination and communication are necessary to enable each party to fully perform as required herein and each party agrees to enact its best efforts and good faith in carrying out its duties herein. Grower shall be responsible for grading and packing the Crop in suitable shipping containers properly identified in accordance with prevailing industry standards and all laws and regulations applicable thereto, under labels or brands designated by Agent.
2. Harvesting and Hauling. Grower shall be responsible for harvesting and hauling Crop from the field to the storage facility designated by Agent, at its sole expense. Agent expressly reserves the right to return any portion of the Crop delivered by Grower which, in Agent's sole judgment, is not marketable. Any portion of the Crop not accepted by Agent shall automatically be released to Grower for sale or disposition elsewhere, and Agent shall have no liability therefor. If Grower fails to act promptly to retrieve any portion of its Crop released by Agent after notice by Agent of the release, Agent is authorized to take the steps it deems necessary to dispose of the released Crops, at Grower's expense. Agent shall be the sole judge of the quality of Crop and market conditions, and may advise Grower to discontinue harvesting at any time it deems marketing or quality conditions to be unfavorable.
3. Cooling and Handling. Where Grower delivers its Crop to the Agent's facilities in Nogales, Arizona, Agent shall be responsible for providing cold storage, pre cooling, handling, strapping, loading, palletizing, other buyer-related supplies and services, at its sole expense, and shall collect directly from buyers for Agent's sole account and without obligation to report to Grower thereon, all revenues and profits for said services. A schedule of all charges to be billed to the customers for such buyer-related services are reflected in Exhibit B.
4. Grower Warranties. Grower warrants that it has full legal right and title to Crop covered hereunder and that Grower's interest is clear and unencumbered. Grower will not transfer ownership of the Crop to anyone without notice and express written approval of Agent. Grower represents and warrants that it is entitled to the complete and unrestricted

use and possession of the Property upon which the Crop is grown, and that Agent shall be granted entry and access to such Property as necessary to perform its obligations hereunder. Grower will immediately notify Agent of any situation which might interfere with Grower's ability to comply with its harvesting schedule, or which may affect the quality or marketability of the Crop. Until the Crop subject to this Agreement has been received and accepted by third-party purchasers at the destination, title to the Crop shall remain with Grower, not Agent. Grower shall bear all quality risks associated with the Crop. Grower warrants that it has the financial resources and technical agribusiness experience necessary to farm, cultivate, grade, pack and harvest the Crop in a proper and farmer like manner, and to ensure that such Crop will be of a good and marketable quality and at the state of maturity required by Agent. Grower further warrants that it possesses all necessary permits, licenses, and authorization to perform its obligations hereunder and that no chemicals have been or will be applied to said Crop or to the land upon which said Crops were grown that would render the intended harvesting, packing, hauling, selling, or consumption of same unsafe or illegal, and that said crop is free from "adulteration" within the meaning of the Federal Food, Drug and Cosmetic Act and any other applicable statute or law. Grower warrants that it has strictly complied with all applicable laws, regulations and all manufacturers' or suppliers' restrictions concerning the application of pesticides, herbicides or any other chemicals, and that it shall maintain application records as required by law. Grower also represents and warrants that neither its operations, nor the production, harvesting or packaging of the Crop violates any federal, state or local ordinance or law relating to, without limitation, health, hygiene, environmental conditions, water, hazardous substances, altered or misbranded food, labor, wages, employment, workers' compensation, personal injury or wrongful death. Grower further covenants that, at all material times hereunder, it shall carry general liability and workers' compensation insurance in an amount deemed sufficient to cover similar operations of the size and nature of the Growers' operations, but in no event shall its minimum general liability coverage limits be less than one million dollars (\$1,000,000.00).

Notwithstanding any other provision herein, and in addition to any other right or remedy Agent may have, Grower agrees to indemnify, protect, and hold Agent harmless from any and all losses, damages, expenses or claims, including without limitation its attorney's fees and costs, arising from the breach of any of Grower's obligations, covenants, representations or warranties described herein or elsewhere in this Agreement.

5. **Marketing Methods/Responsibilities.** Agent shall have full control of the times when, the places where, the parties to whom, the methods by which, and the prices for which the Crop is sold. Agent shall endeavor to obtain the best prices for the kind and quality of Crops produced by Grower; however, Grower acknowledges that Agent makes no guarantee whatsoever as to prices to be actually received for the Crops, or that the prices received will actually yield a positive return to the Grower. As compensation for its services, Agent shall be entitled to a commission of Fifteen percent (15%) of the gross F.O.B. sales price, on all sales, whether on an F.O.B. or Delivered basis (inclusive of freight).

In marketing the Crop, Agent is expressly authorized, without the need to notify or consult with Grower, to 1) sell or consign the Crops through local or destination brokers; to 2) sell on an F.O.B., Delivered, Consignment, re consignment, Open, Price-After-Sale, Price-After-Arrival, Joint Account or Delayed Billing basis; to 3) set weekly, monthly, quarterly or annual prices, to set ceiling or lid prices, to enter into ad or promotional contracts with customers, or to pay promotional allowances, incentives or rebate to customers; to 4) pay any governmental assessments or take any actions required by law; to 5) collect, file, prosecute, and settle claims and lawsuits, in Agent's own name, involving payment disputes with customers, including PACA Trust enforcement actions and carrier claims; 6) to obtain inspections at Grower's expense, whenever Agent, in its sole judgment, deems it commercially reasonable or legally necessary to do so; 7) to register with and market through any e-commerce firm providing services for retailers, or agents, or other customers as may be deemed necessary or commercially prudent in the Agent's sole judgment, with any related fee, commission or charge to be deducted from proceeds due Grower; 8) to take any other action which may be, in Agent's sole judgment, necessary or appropriate under the circumstances to effectively market or distribute the Crop; or 9) to convert the terms of sale from F.O.B. to consignment or to grant price adjustments, credits or allowances due to market changes, or for reported shrinkage, or due to the quality or condition of Crops, Agent is expressly authorized by Grower to grant any such adjustments and to waive Grower's right to require government inspections or other documentation from Agent's customer, whenever, in Agent's sole judgment, it appears practical or prudent to do so. If requiring inspections, dump certificates, accounts of sale or other documentation from the customer would be unreasonable, would unacceptably delay the resale of the perishable Crop, or would otherwise impede the consummation of sale at destination, in Agent's judgment, Grower hereby waives the right to require inspections or other supporting documentation in connection with sales adjustments granted by Agent on any lot

alleged to be of substandard condition at the destination. Agent shall not be liable for errors in judgment in the exercise of its obligations or marketing prerogatives set forth herein.

To the extent Agent incurs expenses or charges for inspection, outside brokerage fees, assessments, rebates, promotional allowances, commissions, repacking, storage fee, bins, caps, pallets, decals, other materials or supplies, services, disposal fees, transportation, legal fees and cost, or any other expenses associated with Agent's duties described above or otherwise incurred in marketing the Crops, or in collecting the proceeds due therefor. Agent is authorized to deduct from Grower's sales proceeds, all such charges incurred.

Agent may elect, in its sole judgment, to participate in promotional events, charitable programs, trade shows, and similar activities for which contributions or donations of Crops are customary in the trade. In the event Agent determines to participate in such, Grower consents and authorizes Agent to use that portion of Grower's Crop necessary for such purposes, and understands that no funds will be received for the portion of the Crop so utilized. Agent will, to the greatest extent possible, distribute the cost of any such promotional or charitable donation, on a pro rata basis, among all consenting Growers during the season in which such donation is made.

6. **Advances.** Agent may, from time to time, make harvest advances to Grower, but in no event shall Agent be required to do so. If harvest advances are made, they shall generally be payable on a weekly basis based upon the actual number of tons harvested, multiplied by a rate established by Agent for the season. In order to secure any sums due or payable by Grower to Agent, including, without limitation, any seed purchases, any plant purchases, any advances or loans made to Grower by Agent, Grower hereby grants to Agent a security interest in Grower's Crop and in any proceeds therefrom. Grower agrees to execute any additional documentation requested by Agent needed to secure Grower's repayment obligations to Agent, and further authorizes Agent to deduct the amount of any advances directly from the proceeds of sale received for the Crop.

7. **Accounting.** Agent shall provide Grower with preliminary accountings of sales on a weekly basis by request, however, the parties recognize that such accountings are subject to change based upon actual returns received. Within thirty (30) days of the final shipment of Grower's Crop, Agent shall provide Grower with a Final Liquidation Report of all sales, on a lot-by-lot basis, showing the gross F.O.B. or Delivered prices received, exclusive of buyer add-on charges referenced in Exhibit A. The sales commissions, advances and all other authorized expenses shall be deducted from the gross sales returns. A sample Final Liquidation Statement is attached hereto as Exhibit B, which Grower has carefully reviewed and which Grower agrees in its current format provides sufficient information about the sales of the Crop, and Grower agrees that such statement constitutes a "complete accounting." Agent shall also provide Grower with preliminary information concerning the average F.O.B. prices received, exclusive of buyer add-on charges to customers, by variety and pack style, for returns Agent has received as of report date. Agent reserves the right to deduct credits or adjustment amounts from subsequent transactions in the event Grower has already been credited or paid on transactions at prices in excess of actual returns. Final payment, less deductions for advances, charges and expenses as authorized herein, shall be made at the time of settlement for the current crop year, which unless otherwise agreed to, shall be within forty-five (45) days of the final shipment of Grower's Crop.

8. **Separate Entities, Liabilities.** Agent and Grower are separate entities separately and independently conducting their own businesses, and this Agreement does not serve to create, nor shall it imply a partnership, or joint venture or joint-employer relationship between them. Each party is to remain as to the other party and independent contractor, responsible for direction of and complete control of its own respective employees or contracted employees. Each party shall maintain its own workers' compensation and general liability coverage as required by law and generally deemed sufficient for its type of business, and agree to protect, defend and hold harmless the other against any injury, labor, employment or damage claims of any sort whatsoever arising out to the operation of its own business or the actions, errors or omissions of its agents, servants, representatives and/or employees. Neither party shall have any authority over the employees, agents or contractors of the other.

9. **Disputes: Mediation/Arbitration.** The parties to this Agreement shall use their best efforts to resolve any dispute, controversy or claim arising out of or relating to this Agreement promptly by meeting and negotiating in good faith with one another. All disputes which cannot first be resolved through good faith negotiations, and which are raised in writing to the

Page 3

Agents Initials _____

Growers Initials _____

other within nine (9) months of the date such claim arose, shall first be submitted to mediation, and if not successfully mediated, shall then be resolved by arbitration according to the Commercial Arbitration Rules of the American Arbitration Association. The award rendered by the arbitrator shall be final and binding on the parties. The cost of any such mediation or arbitration shall be split evenly between the parties. Any claim of either party not raised in writing and severed upon the other within nine (9) months of the date it first accrued shall be deemed waived and may not thereafter be brought before any court, agency or arbitrator.

10. **Term of Agreement.** The term of this Agreement is for the growing and shipping season referenced, by it shall not terminate until each party has performed all of its obligations hereunder. In other words, the Agreement shall continue in force until Grower has delivered its entire Crop for marketing, as specified hereunder, and has fully repaid Agent for advances, interests, costs and commissions, and has performed all other obligations required hereunder; and until Agent has accounted to and paid Grower for any net amounts due it for the sale of the Crops, and performed all other duties required hereunder. Moreover, this Agreement shall be deemed renewed and in full force and effect with respect to any Crop grown by Grower upon delivery to Agent, upon Agent's acceptance of same for distribution and sale, or by acceptance of any advance made by Agent in cash or other valuable consideration to the Grower.

11. **Heirs, Successors, Assigns.** This Agreement shall be binding on, and inure to the benefit of the heirs, executors, administrators, successors and assigns of the parties hereto. Notwithstanding the foregoing, Grower may not assign its rights or duties hereunder without the express written consent of Agent.

12. **Entire Agreement.** This Agreement contains the entire Agreement Between the parties hereto relating to the rights granted and the obligations assumed. Any modifications or amendments to this Agreement shall be of no force and effect unless in writing and signed by the parties hereto.

13. **Partial Invalidity.** Should any term or the application of any term in this Agreement be deemed unlawful, invalid or otherwise unenforceable, the remainder of the Agreement shall not be affected thereby; and each term of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

14. **Grower's Acceptance.** If Grower's Crop is delivered to Agent after receipt of this Agreement, Grower will be deemed to have agreed to be bound by the terms of this Agreement, regardless of whether either or both parties execute and return the Agreement.

15. **Notices.** All correspondence and notices hereunder should be mailed or faxed to the addresses and/or numbers set forth in Exhibit A, or to such other addresses or numbers as either party hereafter advises the other in writing.

Agent: _____ Grower: _____
[Redacted Signature]

President _____ Its: _____

Date: _____ Date: _____

Exhibit A

Name: _____

Address: _____

City/State: _____

Zip: _____

Phone: _____

Fax: _____

Acres: _____ Variety: _____

Location: _____

Exhibit B
Listing of Applicable Charges

Packing Charges:		Squash	Watermelon	Honeydew	Banana
Bulk to Carton	\$3.50	\$.06/lbs	\$.03/lbs	\$3.50	\$.07/lbs
Bulk to Bins			\$.06/lbs	\$3.50	\$.07/lbs
Bin to Carton	\$3.50	Plus Bin refund	Plus Bin refund		Plus Bin refund
Carton to Carton	\$3.50	\$.05/lbs	\$.05/lbs	\$3.50	\$.06/lbs
1 pac / 2 pac		\$.06/lbs	\$.06/lbs		
Bulk Load		\$.03/lbs	\$.03/lbs		
Material Price *	24" Bin \$9.08	Caps \$1.21			
Palletization	\$.95/ctn	\$.95/ctn	\$.95/ctn	\$.95/ctn	\$.95/ctn
In & Out Charge	36" Bin \$4.50	24" Bin \$3.50	Carton \$.35		
Decals	\$10.00/roll	\$10.00/truck	\$10.00/roll	\$10.00/roll	\$10.00/roll
		\$10.00/roll			
Temperature Recorder	\$26.50	National Watermelon Promotion Board Assessment		\$.02/cwt	

Arizona State Federal Inspection

\$.02/cwt

** Material Prices will vary and will be change as prices change without notice.*

APPENDIX A-2: EXCLUSIVE DISTRIBUTION AGREEMENT

EXCLUSIVE DISTRIBUTION AGREEMENT

This Exclusive Distribution Agreement (this "Agreement") is made and entered into as of this [redacted] day of [redacted] 200[redacted], (the "Effective Date") by and between [redacted], an Arizona corporation ("Distributor") and [redacted] S.A. de C.V. a Mexican entity ("Grower").

RECITALS

- A. Grower has ownership, control or possession of [redacted] hectares of farm properties located as set forth on Exhibit A Schedule "A" (the "Land"), attached hereto and incorporated by this reference as if set forth in full, wherein the Grower intends to plant, grow, harvest, and export into the United States fruits and vegetables during what is commonly known as the 200[redacted]-200[redacted] Mexico winter fruit and vegetable season (the "Season").
B. Distributor is in the business of distributing and selling produce in exchange for compensation and is willing to sell and distribute the fruits and vegetables that Grower produces on the Land during the Season (the "Produce") upon the terms and conditions set forth herein.
C. Distributor is willing to advance and lend to Grower certain moneys for the planting, growing, harvesting, picking, packing, and shipping of the Produce during the Season in order to induce Grower to ship the Produce directly and exclusively to Distributor.

NOW, THEREFORE, in consideration of the terms, covenants, and agreements contained herein, the parties agree as follows:

AGREEMENT

1. RECITALS. The parties hereto acknowledge and agree that the foregoing recitals are true, correct, accurate, in proper form and fully binding on them and are incorporated herein by this reference as if set forth in full.

2. THE PRODUCE.

2.1 Commodities/Hectares. Grower, at Grower's sole cost and expense, shall plant, cultivate and grow the fruits and vegetables on the acreage or hectares set forth on Exhibit A Schedule 2.1A attached hereto, on the Land, which fruits and vegetables shall constitute the Produce and shall at Grower's sole cost and expense, harvest, pack, export, ship, and deliver the same exclusively to Distributor's warehouse located as set forth on Exhibit A Schedule 2.1B attached hereto or at such other warehouse location as Distributor shall direct ("Distributor's Warehouse").

2.2 Quantity and Quality of Produce. Grower shall ship to Distributor at Distributor's Warehouse the Produce. Grower shall grow, pick, pack and grade the Produce in accordance with the best standards and practices prevailing in the area in which the Produce is to be grown and will ensure full compliance with all U.S. and Mexican federal, state and local regulations and procedures concerning the same. Grower shall undertake to insure that 1) the Produce shall meet the import and export requirements to the United States of America and

[Redacted signature line]

Canada; and ii) upon delivery of the Produce to Distributor at the Warehouse, the Produce is of merchantable quality and fit for human consumption, including without limitation by securing and safeguarding the Produce to preclude third parties from contaminating or adulterating the Produce.

2.3 **Sales.** Distributor shall sell the Produce from Distributor's Warehouse. Distributor shall, to the exclusion of Grower and in its sole discretion, judge when, to whom, upon what terms and for what prices the Produce shall be sold, it being understood and agreed that Distributor may sell the Produce to any person or organization, including persons or companies related to Distributor or to persons or companies over which Distributor has direct or indirect control or to persons or companies which have direct or indirect control over Distributor ("Related Parties"). Pursuant to 7 C.F.R. §46.32 (e), Grower is hereby advised that the initial circumstances under which Distributor will sell the Produce to Related Parties are set forth on Exhibit A Schedule 2.3. It is expressly understood and agreed that Distributor may, in its sole discretion, sell the Produce F.O.B., on consignment or reconignment, priced on arrival, as delivered sales, or on joint accounts and that Distributor may sell through brokers. Distributor is authorized to enter into agreements with buyers to sell the Produce for a fixed price over a specified period of time, even if the fixed price agreed to is less than what the Distributor would have received had the Produce been sold for the fair market value on each particular date of sale. Distributor is authorized to pay collateral fees, slotting fees, rebates, incentive payments, promotional allowances and the like, the cost of which shall be borne by Grower. The parties agree that Distributor shall not be liable to Grower in the exercise of Distributor's discretion or judgment and that there is no guarantee or representation by Distributor of the price for which it will sell the Produce and whether the Produce will be sold for the same price as other commodities on the same sale date. Distributor may, in its sole discretion, grant receivers or buyers of the Produce rebates and credits against the invoice price of the Produce for any reason, including but not limited to market decline or quality, without the necessity of an inspection relating to the same. Distributor shall have the right to comply with all marketing orders, prorate orders, and marketing agreements that have been made or may be made pursuant to any law or ordinance. All sales proceeds, including palletization and pre-cooling charges from sales of the Produce shall be paid by the receivers to Distributor.

3. **ADVANCES.**

3.1 **Preharvest Advances.** Distributor shall and does hereby agree to advance and loan to the Grower the advances of money and/or goods set forth on Exhibit A Schedule 3.1 attached hereto and such other sums of money or goods as Distributor, in its sole discretion, shall determine (the "Advances"). Grower agrees to apply the Advances to the growing, planting, cultivating and/or packing of the Produce. Except as otherwise set forth on Exhibit A Schedule 3.1, Distributor will advance such sums or furnish goods to Grower at such times and in such amounts or increments as Distributor, in its sole discretion, shall determine and said amounts shall be charged to Grower's account.

3.2 **Terms of Advances.** Each and every one of the Advances whether of cash or goods, shall bear interest at the rate set forth on Exhibit A Schedule 3.2 attached hereto from the date of each specific Advance. Grower shall repay Distributor for the Advances and interest thereon as provided in paragraph 6 of this Agreement provided however that Distributor shall at

any time have the right to immediate payment of all Advances and interest thereon upon demand therefore. If no demand is made for payment of the Advances and interest thereon, the Advances and interest thereon shall be due on [REDACTED], 2004.

3.3 **Pagaré.** Grower agrees to execute a Promissory Note (the "Promissory Note") and/or the pagaré (the "Pagaré") in the form attached hereto as Schedule 3.3 for each Advance. Grower recognizes that each of the Promissory Notes and/or the Pagarés are totally independent of this Agreement, and that Distributor in its sole discretion, may at any time demand payment or initiate collection procedures of the Promissory Notes and/or the Pagarés. Grower waives any legal defense or exception it may have by virtue of any actual or implied rights or personal exceptions derived from this Agreement and as foreseen in Article 8 paragraph XI of the General Law of Negotiable Instruments and Credit Operations.

4. **ADDITIONAL ADVANCES AND CREDITS.**

4.1 **Pick and Pack.** Distributor may, in its sole discretion and without obligation to do so, during the Season as shipments are made, advance to Grower for harvesting, picking, packing, and loading the Produce the amount of pick and pack according to the schedule set forth on Exhibit A Schedule 4.1 attached hereto for each package received by Distributor (the "Pick and Pack"). Grower agrees to apply the Pick and Pack to the picking and packing of the Produce. The Pick and Pack paid to Grower shall be charged to Grower's account. Distributor may, in its sole discretion, discontinue picking and packing advances due to market conditions or other factors.

4.2 **Expenses.** Distributor shall pay and advance the expenses set forth on Exhibit A Schedule 4.2 attached hereto and such other expenses as Distributor, in its sole discretion, shall determine (the "Expenses") and the Expenses shall be charged to Grower's account.

4.3 **Terms of Pick and Pack and Expenses.** Except as provided in paragraph 7.3 of this Agreement, no interest shall be paid by Grower to Distributor for the Pick and Pack and the Expenses. Grower shall repay Distributor for the Pick and Pack and the Expenses as provided in paragraph 6 of this Agreement provided, however, that Distributor shall at any time have the right to immediate payment of all Pick and Pack and all Expenses upon demand therefore. If no demand is made for payment of the Pick and Pack and Expenses, the Pick and Pack and Expenses shall be due on [REDACTED], 2004.

4.4 **Other Expenses.** Grower shall pay for and bear any and all other expenses relating to the Produce, unless pursuant to the terms of this Agreement, Distributor is obligated to pay for the same.

4.5 **Credits.** Grower's account shall be credited for all the Produce sales revenues of the Produce received together with receipts of the items.

5. **DISTRIBUTOR'S COMPENSATION AND EXPENSES.**

5.1 **Compensation.** Distributor shall charge to Grower, and be paid for distributing and selling the Produce, the commission percentage set forth on Exhibit A Schedule 5.1 of the net sales price of the Produce (except for Tomatoes sold at the minimum Reference Price as

[REDACTED]

defined below) net of any adjustments made to sales after shipment of the Produce (the "Commission"). Distributor shall further charge to Grower and be paid the amount per package of Produce received as set forth on Exhibit A Schedule 5.1 attached hereto as a handling or "in and out" charge ("In and Out").

5.2 **Expenses.** Distributor shall pay for and bear the cost of the items if incurred set forth on Exhibit A Schedule 5.2 attached hereto, it being understood and agreed that the expenses relating to said items shall not be charged to Grower's account.

6. **CHARGES TO GROWER'S ACCOUNT.** Any and all advances and expenses whatsoever, except as otherwise specifically set forth in this Agreement, paid or incurred by Distributor whether directly to Grower or to third parties relating to the Produce or otherwise, including but not limited to the Advances, Pick and Pack and Expenses shall be borne by Grower and charged to Grower's account. Distributor's Commission and In and Out charge as set forth in paragraph 5 hereof and interest and principal on the Advances as set forth in paragraph 3 hereof shall be charged to Grower's account. The revenues received for sale of the Produce shall be retained by Distributor and applied against said amounts, including at the time of final liquidation as set forth in paragraph 7.1 herein and/or in Distributor's sole discretion to amounts due from Grower to Distributor pursuant to any other agreement between Distributor and Grower it being understood and agreed that Distributor shall pay no interest to Grower for retention of said Produce. If said sales revenues are insufficient to pay Distributor in full, then Grower shall pay Distributor as provided in paragraph 7 hereof.

7. **LIQUIDATIONS.**

7.1 **Preliminary Liquidations.** Except with regard to disputed invoices, Distributor shall provide to Grower according to the schedule set forth on Exhibit A, Schedule 7.1, a detailed liquidation statement showing the amounts invoiced, received and/or collected as payment for the sale of the Produce, and the deductions of amounts owed to Distributor by Grower, including without limitation the following items, which shall be deducted in the following order of priority or such other order as Distributor shall desire, in its sole discretion: i) the Commission; ii) the In and Out; iii) the Pick and Pack; iv) the Expenses; v) the interest accrued on the Advances; vi) the principal due on the Advances; vii) any other deductions; and viii) amounts due from Grower to Distributor pursuant to any other agreement between Distributor and Grower. After such preliminary liquidations have been rendered, any balance found due and owing to Grower shall forthwith be paid by Distributor to Grower. In the event there is a balance due and owing from Grower to Distributor by reason of the moneys advanced hereunder, Distributor shall apply any revenues received from sale of the Produce and shall carry over the balance to the following preliminary liquidation date.

7.2 **Final Liquidations.** Distributor shall within 45 days from the earlier of i) the termination of this Agreement for any reason; ii) the cessation of shipments of the Produce to the Distributor for any reason; and iii) _____, 2006 give and report in writing to Grower a final liquidation in the manner and deducting the amounts set forth in paragraph 7.1 of this Agreement.

7.3 **Payments.** After such final liquidation has been rendered, any balance found due and owing to Grower shall forthwith be paid by Distributor to Grower. In the event there is a balance due and owing from Grower to Distributor, Grower shall forthwith pay said sum to Distributor. The parties may by mutual consent carry the debt over to the following season. Any sums due hereunder shall be paid in U.S. Dollars and if not timely paid shall bear interest at the rate set forth on Exhibit A Schedule 7.3 attached hereto. If payment is made in Mexico, payment may be made in Mexican currency at the free rate of exchange that Banamex (Banco Nacional de Mexico) has for sale of the United States of America Dollar at the time and date of payment].

8. **EXCLUSIVE DISTRIBUTION/NAMES AND LABELS.**

8.1 **Exclusive Distribution.** Grower covenants and agrees that Grower will consign, ship and deliver all of the Produce exclusively to Distributor F.O.B. Distributor's Warehouse provided however, Grower may, with the prior written consent of Distributor, sell a portion of the Produce on the Mexican National Market. In the event there are monies due from Grower to Distributor, Grower shall pay all sales revenues from sales of the Produce on the Mexican National Market to Distributor.

8.2 **Names and Labels.** Grower agrees that the Produce will be shipped solely and completely under the names and labels set forth on Exhibit A Schedule 8.2 attached hereto, or such other names and labels as Distributor, in its sole discretion, shall instruct Grower. Furthermore, all produce, wherever grown, containing the names and labels designated above or those instructed by Distributor, shall be exclusively shipped to Distributor.

9. **TRADEMARKS, TRADE NAMES AND CORPORATE NAMES.** Neither Distributor nor Grower shall, without the prior written consent of the other, register, use or display any of the other's corporate names, trademarks, symbols, trade names or other intellectual property rights, and the logos associated therewith or any name, symbol or mark confusingly similar thereto. The use of any of Distributor's trademarks, symbols, trade names or other intellectual property rights by Grower shall inure to Distributor's benefit and shall not give Grower any proprietary rights therein. Likewise, the use of any of Grower's trademarks, symbols, trade names or other intellectual property rights by Distributor shall inure to Grower and shall not give Distributor any proprietary rights therein. Distributor and Grower agree that each has no right in or to any corporate names, trademarks, symbols, trade names or other intellectual property rights of the other and that neither Distributor nor Grower shall obtain any rights thereto and that any act by Distributor or Grower contrary to such understanding shall constitute a breach of this Agreement.

10. **REPORTING AND INSTRUCTIONS.**

10.1 **Reporting.** Grower shall report his manifests or shipments of the Produce to Distributor not later than 3:00 p.m. Mountain Standard Time on the day of shipment. Manifests should be received 24 hours before arrival in Nogales, Sonora, Mexico.

10.2 **Instructions.** Grower shall periodically receive instructions of the Distributor with reference to the picking, packing, and shipping of the Produce. Grower shall comply strictly with the picking, packing, and shipping instructions furnished by Distributor, including but not

limited to halting or ceasing the shipping of Produce, if, in the sole discretion of Distributor, market conditions or the quality of the Produce require the same.

10.3 **Marketing Information.** Distributor shall keep Grower informed about market conditions and prices periodically, and shall report to Grower the inspections and prices of all the Produce received.

11. **UNCOLLECTED ACCOUNTS RECEIVABLE.** Any loss incurred as a result of uncollectible accounts receivable shall be borne by Distributor. Distributor may, in its sole discretion and at its sole cost, but without any obligation to do so, attempt to collect all accounts receivable. Distributor shall have authority to file claims, make adjustments, and arrange settlements on any disputed items.

12. **REPRESENTATIONS AND WARRANTIES.**

12.1 **Grower.** Grower represents and warrants as follows:

12.1.1 Grower is/are (an) individual(s) doing business as produce grower. Grower's exact legal name is as set forth in the heading to this Agreement. If Grower is an organization, Grower's type of organization and jurisdiction of organization are as set forth in the heading to this Agreement, and Grower's sole place of business or if Grower has more than one place of business, Grower's chief executive office is located at the address set forth for notices to Grower below. If Grower is an individual, Grower's principal residence is at Grower's address for notices set forth below. Except as specifically disclosed by Grower to Secured Party prior to the execution of this Agreement, during the five (5) years and six months prior to the date of this Agreement Grower has not been known by any legal name different from the one set forth in the heading of this Agreement nor has Grower been the subject of any merger, consolidation, or other corporate or organizational reorganization.

12.1.2 The execution of this Agreement and all documents executed in conjunction herewith, including but not limited to the Pagaré (collectively "Agreements") and the consummation of the transactions contemplated hereby are not contrary to Grower's Articles of Incorporation or governing documents and will not constitute a breach of or a default under any contract or instrument to which Grower is a party.

12.1.3 Grower has full authority to execute the Agreements. Grower relied solely upon Grower's own knowledge, judgment and experience in making the decision to enter into the Agreements and has not relied upon any representation, warranty, statement, advice or information of any type provided by or on behalf of any of the parties hereto, except as specifically stated in this Agreement.

12.1.4 Grower has all necessary right and power to enter into the Agreements thereof and that the Agreements have been duly authorized by all necessary action of every type whatsoever on behalf of Grower.

12.1.5 The Agreements and the obligations of the Grower thereunder are, and forever shall be, the legal, binding and joint and several obligations of Grower enforceable in accordance with their terms.

12.1.6 That Grower's RFC number is set forth on Exhibit A Schedule 12.1.7 attached hereto.

12.1.7 There are no pledges, security interests or liens in the Collateral (as defined paragraph 23 of this Agreement), which are prior to the pledge, security interest and lien granted to Distributor pursuant to paragraph 23 of this Agreement.

12.1.8 There are no pledges, security interests or liens relating in any manner to the following: Crops growing or to be grown by Grower on the Land, including, without limitation, the Produce (the "Land Crops"); Crops growing or to be grown by Grower on property other than the Land (the "Other Crops"); Crops purchased, delivered or consigned to Grower (the "Purchased Crops") (the Land Crops, Other Crops and Purchased Crops, collectively referred to as the "Crops"); Rights under contracts of insurance covering any of the above-described property; Rights under the Perishable Agricultural Commodities Act; Deposit accounts or certificates of deposit arising out of the Crops or any other property described herein; Letter of credit rights arising out of the sale or transfer of the Crops or any other property described herein; Payment intangibles arising out of the sale or transfer of the Crops or any other property described herein; Securities and all other investment property, supporting obligations or any other contract rights or rights to the payment of money arising out of the sale or transfer of the Crops or any other property described herein; Accounts, accounts receivable, contract rights, rights to payment, chattel paper (whether tangible or electronic), leases, instruments, notes, documents of title, and general intangibles (including but not limited to all payment intangibles, customer lists, goodwill and all licenses, permits, agreements of any kind or nature pursuant to which Grower possesses, uses or has authority to possess or use property of others); Inventory of any type, whether or not of Crops or arising out of the Crops, including, without limitation, raw materials, work-in-process or materials used or consumed in the business of Grower, whether in the possession of Grower, warehouseman, bailee or any other person or entity; Machinery, furniture, fixtures and other equipment; negotiable and nonnegotiable documents of title; monies, securities or other property now or hereafter in the possession of or on deposit with Distributor, whether held in a general or special account of deposit, including, without limitation, any account or deposit held jointly by Grower with any other person or entity, or for safekeeping or otherwise, except to the extent specifically prohibited by law; Rights under contracts of insurance covering any of the above-described property; Attachments, accessions, tools, parts, supplies, increases and additions to and all replacements of and substitutions for any of the above-described property; Products of any of the above-described property; Proceeds of any of the above-described property; and Books and records pertaining to any of the above-described property, including, without limitation, any computer readable memory and any computer hardware or software necessary to process such memory.

12.1.9 Grower has full rights to use and possess the Land and dispose of the Produce grown thereon and that the grade and soil conditions and supply of water on the Land are suitable and adequate for growing the Produce.

12.1.10 Grower has adequate financing to perform Grower's obligations under the Agreements.

12.1.11 The Produce is on the date of shipment and delivery to Distributor at the Warehouse, i) not adulterated or misbranded within the meaning of the Federal Food, Drug and Cosmetic Act, as amended and regulations adopted thereunder; ii) not adulterated or misbranded within the terms of the Federal Insecticide, Fungicide and Rodenticide Act, the Federal Hazardous Substance Act, the Poison Prevention Packaging Act, the Toxic Substance Control Act and the Fair Packaging and Labeling Act and their respective regulations; iii) not an article which may not, under the provisions of Sections 344 or 355 of the Federal Food, Drug and Cosmetic Act, be introduced into interstate commerce; iv) not adulterated or misbranded within the meaning of or in violation of any disclosure or warning required under the pure food and drug or health, safety or environmental laws, regulations or ordinances of any state or other government authority which are applicable to such shipment or delivery; and v) in compliance with all other federal, state and local laws and regulations applicable to such shipment or delivery; and vi) of merchantable quality and fit for human consumption.

12.2 **Distributor.** Distributor represents and warrants as follows:

12.2.1 It is a corporation duly organized, validly existing and in good standing under the laws of the State of Arizona.

12.2.2 The execution of this Agreement is not contrary to its Articles of Incorporation or Bylaws and the execution and delivery of this Agreement and the consummation of the transactions contemplated hereby will not constitute a breach of or a default under any contract or instrument to which it is a party.

12.2.3 It has full authority to execute this Agreement.

12.2.4 It has relied solely upon its own knowledge, judgment and experience in making the decision to enter into this Agreement and has not relied upon any representation, warranty, statement, advice or information of any type provided by or on behalf of any of the parties hereto.

12.2.5 This Agreement and the obligations of Distributor hereunder are, and forever shall be, the legal, binding obligations of Distributor, enforceable in accordance with their terms.

13. **RELATIONSHIP OF PARTIES.** Notwithstanding the payments to be made pursuant to this Agreement, nothing contained herein shall be deemed to create an employer-employee, agency, partnership or joint venture relationship between Grower and Distributor. Grower shall be liable and responsible for all expenses of the growing, picking, harvesting, and shipping of the Produce. Grower shall have no right to act on behalf of or in the name of Distributor and Grower shall have no power or authority to bind Distributor.

14. **INSPECTION/ RECORDS.** Distributor shall have the right to have an agent or representative present on the Land or at any shipment or packing point at any time during the growing, picking, packing, and shipping of the Produce, and shall, if it so desires, sample any of the Produce for chemical evaluation or specify and direct the type of packing and selection of the Produce as it may deem to be in the best interests of the parties. Distributor shall have the right to review Grower's books and records regarding the Produce during all reasonable hours.

Grower shall have the right to review Distributor's books and records regarding the Produce at all reasonable hours, provided however that Grower shall have no right to review the identity of Distributor's customers.

15. **CO-MINGLING, POOLING AND MIXING.** It is expressly agreed and understood that Distributor shall be, and it hereby is, authorized to co-mingle, pool, and mix the Produce and receipts therefrom with the produce and receipts of other growers, whether any of said produce has been shipped on consignment or otherwise. Distributor may, in its absolute discretion, pool in any individual shipments any or all of the crops delivered to it hereunder with any other crops of like kind or quality, and in reporting and accounting for the sale of said crops so pooled, Distributor need indicate only the average prices received from such sale or sales.

16. **INCAPACITATION OR DEATH.** In the event Grower or its managing agent shall become incapacitated or die at any time between the planting and delivery of all of the said Produce at Distributor's Warehouse during the Season covered by the Agreement, the survivors of Grower shall take over in the name of and on behalf of the deceased Grower or his estate, and complete the planting, growing, and harvesting, and shall be bound by the terms of this Agreement or Grower shall appoint a new managing agent. Distributor, if it desires to undertake the work, shall be paid for all expenses incurred by it in connection with the said planting, growing, harvesting, packing, and/or shipping in addition to the compensation provided for herein.

17. **COMPLIANCE WITH LAWS.** The parties agree to comply with all applicable U.S. and Mexican federal and state standards, laws and regulations relative to the Produce, including but not limited to those relating to the use of the pesticides, fungicides, insecticides, rodenticides and other chemicals and the Perishable Agricultural Commodities Act.

18. **DISCONTINUATION.** Notwithstanding anything to the contrary contained herein, Distributor shall have the right at any time or times to discontinue the marketing or selling the Produce at any time or times when, in its sole and absolute judgment, the Produce is not fit or suitable for shipment or sale, or in the event that the market price then prevailing for the Produce is less than the cost of picking and packing the same, it being understood that Distributor may refuse to accept any shipment from Grower and return the shipment to Grower at Grower's expense. In the event that Distributor so discontinues, Distributor shall be relieved of the obligation, if any, to advance monies or pay expenses pursuant to the terms of this Agreement. Distributor shall have the right to resume selling and marketing the Produce whenever, in its sole and absolute judgment, the quality of the Produce is suitable for sale or the market price therefore is sufficient to pay for said expenses.

19. **TITLE/RISK OF LOSS.** Until such time as the Produce is delivered to the receiver, title to the Produce shall remain with Grower. Accordingly, Distributor shall bear no risk for loss, damage, destruction or the like to the Produce. Either the receiver of the Produce or Grower shall bear the entire risk of loss of damage to the Produce.

20. **INDEMNITY.** Grower agrees to indemnify and hold Distributor, its agents, employees, shareholder, directors, officers and/or affiliates harmless for, from and against any claims, demands, actions, causes of action, obligations, damages, debts, liabilities, expenses and losses,

including court costs and attorney's fees, arising directly or indirectly out of or in connection with i) any breach by the Grower, its officers, agents or employees of any term or condition of this Agreement, including, but not limited to any representation or warranty made by the Grower; ii) all products liability or warranty claims relating to the Produce; iii) any injury or damage to persons on property arising out of or resulting from the negligence or misconduct of the Grower, or its officers, agents or employees, by or on behalf of any person or entity in connection with the sale, distribution or handling of the Produce; iv) any contravention by the Grower, its officers, agents or employees of any instruction, condition, requirement rule or regulation or law; v) the Grower's failure to pay any costs or expenses required to be paid by the Grower pursuant to this Agreement; vi) any labor or environmental claims arising from the Land or the Grower's farming activities in Mexico, or any acts or omissions in connection with its harvesting or production of the Produce; vii) damage, destruction or the like to the Produce as well as from any consequence thereof sustained while risk of loss remains upon Grower or the receiver of the Produce; and viii) failure of the Produce, upon delivery to the Distributor at the Warehouse, to be of merchantable quality and fit for human consumption, including without limitation as a result of acts of third parties contaminating or adulterating the Produce.

21. **INSURANCE.** Grower agrees to carry and pay for liability insurance in the amount set forth on Exhibit A Schedule 21 attached hereto on which the Distributor is a named insured, with respect to all liabilities, including, without limitation, products liability, property damage or loss, and provide to the Distributor a certificate or proof of such insurance within 7 days after written request of the Distributor therefore.

22. **PLEDGE.** Grower consents to Distributor pledging all Grower's inventory and accounts receivables, to any person or entity including a financial institution of Distributor's choice and will execute such documentation as may be necessary to effect said pledge. Distributor may factor Grower's accounts receivable inasmuch as this will permit Distributor to expedite the payment of items payable pursuant to Paragraphs 3 and 4 hereof. Distributor agrees to bear the cost of interest on said borrowings.

23. **SECURITY AGREEMENT.**

23.1 **Security Interest.** To secure the Grower's Obligations (as defined below), Grower, as debtor, grants, conveys, pledges, assigns and transfers to Distributor, as secured party and lienholder, a first priority security interest, pledge and lien in and to, all of Grower's right, title and interest, whether now owned or existing, or hereafter created, acquired or arising, wherever located, in the following (collectively, the "Collateral"):

23.1.1 All crops growing or to be grown by Grower on the Land, including, without limitation, the Produce (the "Land Crops");

23.1.2 All crops growing or to be grown by Grower on property other than the Land (the "Other Crops");

23.1.3 All crops purchased, delivered or consigned to Grower (the "Purchased Crops") (the Land Crops, Other Crops and Purchased Crops, collectively referred to as the "Crops");

23.1.4 All rights under contracts of insurance covering any of the above-described property;

23.1.5 All rights under the Perishable Agricultural Commodities Act;

23.1.6 All deposit accounts or certificates of deposit arising out of the Crops or any other property described herein;

23.1.7 All letter of credit rights arising out of the sale or transfer of the Crops or any other property described herein;

23.1.8 All payment intangibles arising out of the sale or transfer of the Crops or any other property described herein;

23.1.9 All securities and all other investment property, supporting obligations or any other contract rights or rights to the payment of money arising out of the sale or transfer of the Crops or any other property described herein;

23.1.10 All accounts, accounts receivable, contract rights, rights to payment, chattel paper (whether tangible or electronic), leases, instruments, notes, documents of title, and general intangibles (including but not limited to all payment intangibles, customer lists, goodwill and all licenses, permits, agreements of any kind or nature pursuant to which Grower possesses or has authority to possess or use property of others);

23.1.11 All inventory of any type, whether or not of Crops or arising out of the Crops, including, without limitation, raw materials, work-in-process or materials used or consumed in the business of Grower, whether in the possession of Grower, warehouseman, bailee or any other person or entity;

23.1.12 All machinery, furniture, fixtures and other equipment;

23.1.13 All negotiable and nonnegotiable documents of title;

23.1.14 All monies, securities or other property now or hereafter in the possession of or on deposit with Distributor, whether held in a general or special account of deposit, including, without limitation, any account or deposit held jointly by Grower with any other person or entity, or for safekeeping or otherwise, except to the extent specifically prohibited by law;

23.1.15 All rights under contracts of insurance covering any of the above-described property;

23.1.16 All attachments, accessions, tools, parts, supplies, increases and additions to and all replacements of and substitutions for any of the above-described property;

23.1.17 All products of any of the above-described property;

23.1.18 All proceeds of any of the above-described property; and

23.1.19 All books and records pertaining to any of the above-described property, including, without limitation, any computer readable memory and any computer hardware or software necessary to process such memory.

23.2 Obligations Secured. The Collateral shall secure the following (collectively, the "Obligations"):

23.2.1 Payment and performance of all obligations of Grower under the terms of this Agreement, as modified from time to time, including, without limitation, all Advances and accounts hereunder;

23.2.2 Payment and performance of all obligations of Grower under the terms of the Promissory Note and the Pagaré, and all extensions, modifications, substitutions or renewals thereof; and

23.2.3 Payment and performance of all obligations of Grower under the terms of any other agreement between Grower and Distributor.

23.3 Perfection of Security Interest. The security interest, pledge and lien granted to Distributor, at all times, shall be perfected and shall be prior to any other interests in the Collateral. Grower shall act and perform as necessary and shall authenticate, file and register all security agreements, deeds, financing statements, continuation statements and other documents requested by Distributor to establish, maintain and continue Distributor's perfected security interest, pledge and lien in the Collateral. Grower, on written demand, shall promptly pay all costs and expenses of filing, registering and recording, including, without limitation, the costs of any searches, deemed necessary by Distributor from time to time to establish and determine the validity and the continuing priority of Distributor's security interest, pledge and lien. This Agreement is being entered into pursuant to Article 9 of the Uniform Commercial Code and Article 2857 of the Civil Code for the Federal District and its correlative Article for the State of Arizona. This Agreement will be registered with the Public Registry of Property corresponding to the location of the Land.

23.4 Covenants. Grower agrees that so long as this agreement remains in effect, it will notify Distributor in writing at least sixty (60) days in advance of:

23.4.1 any change whatsoever in the name of debtor;

23.4.2 any change whatsoever in the state or jurisdiction in which debtor is formed or, if debtor is an individual, in which debtor's principal residence is located, or

23.4.3 any change whatsoever in the name(s) under which debtor conducts business, any new names under which debtor intends to do business, or, and

23.4.4 any new addresses at or from which debtor intends to do business or to keep collateral of any kind.

23.5 **Events of Default.** Any failure to pay any principal, interest or any other part of the Obligations when the same shall become due and payable or any breach of any warranty, representation, covenant or agreement made in this Agreement, or in the event that Grower shall fail to maintain its existence in good standing in its state of formation or shall fail to be duly qualified, in good standing and authorized to do business in each jurisdiction where failure to do so might have a material adverse impact on the consolidated assets, condition or prospects of Distributor, shall constitute an Event of Default.

23.6 **Remedies.** Upon the occurrence of any Event of Default, Distributor shall have the following rights and remedies and may do one or more of the following, to the extent permitted by applicable law:

23.6.1 Declare all or any part of the Obligations to be immediately due and payable.

23.6.2 Without further notice or demand and without legal process, take possession of any Collateral not already in its possession, wherever found and, for this purpose, enter upon any property occupied by or in the control of Grower. Grower, upon demand by Distributor, shall assemble the Collateral and deliver it to Distributor or to a place designated by Distributor that is reasonably convenient to both parties.

23.6.3 Upon obtaining possession of the Collateral or any part thereof, sell such Collateral at public or private sale, as permitted by applicable law. The proceeds of such sale, after deducting therefrom all expenses of Distributor in taking, storing, and selling the Collateral (including, without limitation, attorneys' fees) shall be applied to the payment of the Obligations, and any surplus thereafter remaining shall be paid to Grower or any other person that may be legally entitled thereto. In the event of a deficiency between such net proceeds from the sale of the Collateral and the total amount of the Obligations, Grower, upon demand, shall promptly pay the amount of such deficiency to Distributor.

23.6.4 Distributor shall have all the rights and remedies afforded a secured party under the Uniform Commercial Code and all other remedies allowed under applicable law.

23.6.5 Distributor may bring an action or demand with a court of competent jurisdiction to obtain possession of, and to secure its rights in, the Collateral.

23.6.6 Distributor may bring an action for indemnification for breach of this Agreement in an amount equal to: i) the Commission; ii) the In and Out; iii) the Pack and Pick; iv) the Expenses; vi) the interest accrued on the Advances; v) the principal due on the Advances; and vii) any other deductions.

23.7 **Power of Attorney.** Grower hereby appoints Distributor as its true and lawful attorney-in-fact, with full power of substitution, to do any one or more of the following:

23.7.1 Demand, collect, receive, receipt for, sue and recover all sums of money or other property which may now or hereafter become due, owing or payable from the Collateral;

23.7.2 Execute, sign and endorse any and all claims, instruments, receipts, checks, drafts or warrants issued in payment for the Collateral;

23.7.3 Settle or compromise any and all claims arising under the Collateral, and, in the place and stead of Grower to execute and deliver its release and settlement for the claim;

23.7.4 File any claim or claims or to take any action or institute or take part in any proceedings, either in its own name or in the name of Grower or otherwise, which in the discretion of Distributor may seem to be necessary or advisable; and

23.7.5 Execute and/or authenticate any documents necessary to perfect or continue the security interest. This power is a power coupled with an interest and is given as security for the Obligations, and the authority hereby conferred is and shall be irrevocable and shall remain in full force and effect until renounced by Distributor.

23.8 **Distributor's Right of Setoff.** Grower grants Distributor as further security for the Obligations, a security interest and lien in any credit balance and other money now or hereafter owed Grower by Distributor. Grower agrees that Distributor may, without prior notice or demand, charge against any such credit balance or other money in the amount owing upon the Obligations, whether due or not.

23.9 **Indemnification.** Grower agrees to indemnify, defend, protect and hold harmless Distributor and its affiliates and their respective successors, assigns and shareholders and the directors, officers, employees, agents and attorneys of the foregoing (collectively, the "Indemnified Parties") for, from and against any and all other liabilities, obligations, losses, damages, penalties, actions, judgments, suits, claims, costs, expenses and disbursements of any kind or nature whatsoever (including, without limitation, the fees and disbursements of counsel for such Indemnified Parties in connection with any investigative, administrative or judicial proceeding commenced or threatened, whether or not such Indemnified Parties are designated parties thereto) that may be imposed on, incurred by, or asserted against the Indemnified Parties, in any manner relating to or arising out of this Agreement and the Pagaré.

24. **FORCE MAJEURE.** Neither party shall be responsible for any loss or damage resulting from any delay or failure in performing any provision of this Agreement, except Grower's duty to pay Distributor pursuant to this Agreement and the Pagaré, if the delay or failure results from: (a) transportation shortages, inadequate supply of labor, material or energy, or the voluntary foregoing of the right to acquire or use of any of the foregoing in order to accommodate or comply with the orders, requests regulations, recommendations or instructions of any government or any department or agency thereof; (b) compliance with any law, ruling, order, regulation, requirement or instruction of any government or any department or agency thereof; (c) acts of God; (d) fires, strikes, labor troubles, embargoes, war or riot; or (f) any other reason beyond the control of that party. Any delay resulting from any of such causes shall extend performance accordingly or excuse performance in whole or in part, as may be necessary.

25. **TERMINATION/TERM.** This Agreement shall, except as otherwise provided pursuant to law or pursuant to the terms of this Agreement, terminate on the date set forth on Exhibit A Schedule 25 attached hereto, provided however that any such termination shall not terminate

either parties' claims, rights and remedies pursuant to this Agreement, including without limitation, as a secured party. Notwithstanding the foregoing, Distributor shall, in addition to such other rights and remedies that Distributor may have, whether at law or equity have the right to immediately terminate this Agreement i) in the event Grower breaches any term in this Agreement, and any agreements executed in conjunction with this Agreement, including but not limited to the Promissory Note and/or the Pagaré; or ii) in the event Grower becomes insolvent, or applies for or consents to the appointment of a trustee, receiver or liquidator of assets or makes an assignment for the benefit of creditor or files for bankruptcy or the like.

26. GENERAL PROVISIONS.

26.1 Further Assurances. Each of the parties hereto shall execute and deliver all such other instruments and take all such actions as either party may reasonably request from time to time in order to effectuate the purposes of this Agreement and the transactions provided for herein.

26.2 Notices. All notices, requests, demands and other communications required or permitted under this Agreement shall be in writing and shall be deemed to have been duly given, made and received when delivered against receipt, or when sent by facsimile, or 5 days after being sent by registered or certified mail, postage prepaid, return receipt requested, addressed to the recipient's address as set forth below:

W

If to Distributor: [Redacted]
 Attn: [Redacted]
 P.O. Box [Redacted]
 Nogales, Arizona 85628

Fax no: (520) 281-2156

With a Copy to: [Redacted]
 Fax No: (520) [Redacted]

If to Grower: As set forth on Exhibit A Schedule 26.2

With a Copy to: As set forth on Exhibit A Schedule 26.2

Either party may alter the address to which communications are to be sent by giving notice of the change of address in conformity with the provisions of this paragraph for the giving of notice.

26.3 Entire Agreement. This Agreement contains the entire agreement and understanding between the parties hereto with respect to the subject matter hereof, and supersedes and is in lieu of all prior and contemporaneous agreements, understandings, inducements and conditions, express or implied, oral or written, of any nature whatsoever with

[Redacted]

respect to the subject matter hereof. The express terms hereof control and supersede any course of performance or usage of the trade inconsistent with any of the terms hereof.

26.4 Controlling Law; Exclusive Jurisdiction and Venue. The parties intend that this Agreement shall be fully enforceable both in the United States of America and in the United Mexican States. Accordingly, the parties agree that each shall be entitled to concurrently bring any suit, action or proceeding with respect to this Agreement in the United States of America and/or in the United Mexican States. For everything related to the interpretation of, compliance with, or judicial request for payment of the obligations under this Agreement in the United States of America the parties hereby irrevocably and expressly submit to the jurisdiction of (i) the competent courts of the State of Arizona in the City of Nogales, Arizona, United States of America or (ii) the competent courts of the United States of America, District of Arizona located in Tucson, Arizona thereby expressly waiving any other U.S. jurisdiction or venue to which they may be entitled. For everything related to the interpretation of, compliance with, or judicial request for payment of the obligations under this Agreement in the United Mexican States the parties hereby irrevocable submit themselves to the competent courts in the City of Nogales, Sonora, United Mexican States, thereby expressly waiving any other Mexican jurisdiction to which they may be entitled. This Agreement shall be governed by the laws of the State of Arizona without reference to its choice of law provisions provided, however, that in any suit, action or proceeding with respect to this Agreement in the United Mexican States, the Agreement shall be governed by and construed in accordance with the law applicable to City of Nogales, Sonora, United Mexican States, without reference to its choice of law provisions. NOTWITHSTANDING THE FOREGOING, ANY LEGAL ACTION OR PROCEEDING AGAINST THE GROWER, INCLUDING WITHOUT LIMITATION, TO ENFORCE THE SECURITY INTEREST AND FOR THE RECOGNITION AND ENFORCEMENT OF ANY JUDGMENT OBTAINED FROM THE COURT OF "EXCLUSIVE GENERAL JURISDICTION, MAY BE BROUGHT IN ANY COURT OF COMPETENT JURISDICTION. FURTHERMORE, NOTHING IN THIS AGREEMENT SHALL PREVENT DISTRIBUTOR FROM COMMENCING ANY LEGAL PROCEEDING IN A JURISDICTION IN WHICH SOME OR ALL OF THE GROWER'S ASSETS ARE LOCATED FOR THE PURPOSE OF OBTAINING A PROVISIONAL REMEDY OR OBTAINING JURISDICTION OVER THOSE ASSETS.

26.5 Indulgences Not Waivers. Neither the failure nor any delay on the part of a party to exercise any right, remedy, power or privilege under this Agreement shall operate as a waiver thereof, nor shall any single or partial exercise of any right, remedy, power or privilege preclude any other or further exercise of the same or of any right, remedy, power or privilege, nor shall any waiver of such right, remedy, power or privilege with respect to any occurrence be construed as a waiver of such right, remedy, power or privilege with respect to any other occurrence. No waiver shall be effective unless it is in writing and is signed by the party asserted to have granted such waiver.

26.6 Provisions Severable. The provisions of this Agreement are independent of and severable from each other, and no provision shall be affected or rendered invalid or unenforceable by virtue of the fact that for any reason any other or others of them may be invalid or unenforceable in whole or in part. Further, if a court of competent jurisdiction determines that any provision of this Agreement is invalid or unenforceable as written, such court may interpret,

construe, rewrite or revise such provision, to the fullest extent allowed by law, so as to make it valid and enforceable consistent with the intent of the parties hereto.

26.7 **Numbers of Days.** In computing the numbers of days for purposes of this Agreement, all days shall be counted, including Saturdays, Sundays and holidays in the State of Arizona; provided, however, that if the final day of any time period falls on a Saturday, Sunday or holiday, then the final day shall be deemed to be the next day that is not a Saturday, Sunday or holiday.

26.8 **Attorneys' Fees.** In any legal proceeding arising out of this Agreement, including with respect to any instrument, document or agreement made under or in connection with this Agreement, the prevailing party shall be entitled to recover its costs and actual attorneys' fees. As used in this Agreement, "actual attorneys' fees" shall mean the full and actual cost of any legal services actually performed in connection with the matters involved, calculated on the basis of the usual hourly fees charged by the attorneys performing such services.

26.9 **Construction.** The parties hereto acknowledge and agree that the rule of construction to the effect that any ambiguities are to be resolved against the drafting party will not be applied to the interpretation of this Agreement. No inference in favor of, or against, any party shall be drawn from the fact that one party has drafted any portion hereof.

26.10 **Application and Amendment.** This Agreement may only be amended or modified by written agreement signed by all of the parties hereto.

26.11 **Execution in Counterparts.** This Agreement may be executed in any number of counterparts, including facsimile copies thereof, each of which shall be deemed to be an original as against any party hereto whose signature appears hereon, and all of which shall together constitute one and the same instrument. This Agreement shall become binding when one or more counterparts hereof, individually or taken together, shall bear the signatures of all of the parties reflected hereon as the signatories.

26.12 **Assignment.** It is expressly understood and agreed that Distributor may, in its sole discretion and without permission of Grower, assign any and all rights and obligations hereunder to a third party at any time during the term of this Agreement. Grower may not assign this Agreement without the prior written consent of Distributor.

26.13 **Binding Effect.** This agreement shall govern the rights, duties and obligations as of the Effective Date notwithstanding its execution after said date.

26.14 **No Third Party Beneficiary.** Except for the parties to this Agreement, no other party shall have the right to enforce any provision of this Agreement nor to recover damages by reason of any breach hereof by either of the parties hereto and no party other than the parties hereto shall have the right to any benefits or privileges arising from this Agreement.

27. **INDEPENDENT COUNSEL/TRANSLATION.** GROWER ACKNOWLEDGES THAT [REDACTED] REPRESENTS DISTRIBUTOR AND THAT GROWER HAS OR HAS HAD AN OPPORTUNITY TO CONSULT WITH INDEPENDENT COUNSEL OF GROWER'S CHOICE REGARDING THIS AGREEMENT AND THE TERMS AND CONDITIONS

HEREOF. GROWER FURTHER ACKNOWLEDGES THAT GROWER HAS OR HAS HAD THE OPPORTUNITY TO HAVE THIS AGREEMENT TRANSLATED INTO THE SPANISH LANGUAGE AND THAT IF IT HAS BEEN SO TRANSLATED, THE ENGLISH VERSION SHALL CONTROL OVER THE SPANISH VERSION. GROWER AGREES, IN ANY EVENT TO BE BOUND BY THE TERMS OF THIS AGREEMENT.

28. ABOGADO INDEPENDIENTE/TRADUCCION. AGRICULTOR RECONOCE QUE [REDACTED] REPRESENTA DISTRIBUIDOR Y QUE EL AGRICULTOR HA TENIDO OPORTUNIDAD DE CONSULTAR UN ABOGADO INDEPENDIENTE DE SU PREFERENCIA EN TODO RELACIONADO A ESTE CONTRATO ASI COMO LOS TERMINOS Y CONDICIONES AQUI ESTIPULADOS. ADEMAS, AGRICULTOR RECONOCE QUE HA TENIDO LA OPORTUNIDAD DE QUE ESTE CONTRATO SEA TRADUCIDO AL IDIOMA ESPANOL Y A PESAR DE DICHA TRADUCCION, LA VERSION EN EL IDIOMA INGLES TENDRA CONTROL SOBRE LA VERSION EN ESPANOL. AGRICULTOR ESTA DE ACUERDO Y SE OBLIGA EN CUALQUIER CASO POR LOS TERMINOS ESTIPULADOS EN ESTE CONTRATO.

\\
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\\

IN WITNESS WHEREOF, the parties hereto have set their hands as of the day and year first above written.

"Grower"

"Distributor"

[REDACTED]
A Mexican entity

[REDACTED]
An Arizona [REDACTED]

By: [REDACTED]

By: [REDACTED]

Its: [REDACTED]

Its: [REDACTED]

Date: [REDACTED]

Date: [REDACTED]

[REDACTED]

EXHIBIT A

**SCHEDULE A
ADDRESS AND LEGAL DESCRIPTION OF THE LAND**

SCHEDULE 2.1A

Commodities	Hectares
[REDACTED]	0
[REDACTED]	0
[REDACTED]	0
[REDACTED]	0
[REDACTED]	0

**SCHEDULE 2.1B
LOCATION OF DISTRIBUTOR'S WAREHOUSE**

[REDACTED]
Nogales, Arizona 85621

**SCHEDULE 2.3
INITIAL CIRCUMSTANCES UNDER WHICH DISTRIBUTOR WILL SELL THE
PRODUCE TO RELATED PARTIES**

None

**SCHEDULE 3.1
ADVANCES**

Cash Advances: \$1,000,000.00 U.S. Dols. To be advanced as follows:
August 2007 - \$300,000.00
September 2007 - \$300,000.00
October 2007 - \$300,000.00
November 2007 - \$100,000.00

**SCHEDULE 3.2
INTEREST RATE PER ANNUM ON ADVANCES**

6.5% Interest

SCHEDULE 4.1
PICK AND PACK

The Pick and Pack payments shall be made on Friday of each week for the packages of Produce received by Distributor during the period from the Friday of the previous week through the Thursday preceding the Friday payment (the "Pick and Pack Period"). The amount of pick and pack shall be U.S.\$2.00 for each package of eggplant, U.S.\$6.00 for each package of long beans and U.S.\$5.00 for each package of grape tomato received during the Pick and Pack Period.

SCHEDULE 4.2
EXPENSES PAID BY DISTRIBUTOR AND CHARGED TO GROWER

Marketing at the rate of US\$.10 per package of Produce sold by Distributor
 Mexican freight charges
 U.S. and Mexican duties
 C.A.A.D.E.S charges
 Gov. de Estado de Sinaloa charges
 Repacking upon arrival
 Brokers' fees and charges
 Palletization charges
 Material charges
 Ice charges
 Crossing and destination inspections
 Assessments levied
 Collateral fees
 Slotting fees
 Rebates
 Incentive payments
 Promotional allowances
 U.S. freight and other expenses for Produce
 with a quality problem at destination and/or on delivered price sales

SCHEDULE 5.1
DISTRIBUTOR'S COMPENSATION

Twelve percent (12%) commission

SCHEDULE 5.2
DISTRIBUTOR'S EXPENSES NOT CHARGED TO GROWER

Interest on Distributor's credit line
~~_____~~

SCHEDULE 7.1
SCHEDULE FOR LIQUIDATIONS

It is expressly understood and agreed that each shipment and sale will not be liquidated separately but an accounting by lot shall be made on the 20th day of each month for all lots of produce sold during the calendar month preceding the preliminary liquidation date. In addition, Distributor may issue preliminary liquidations every 15 days, it being understood and agreed that said liquidations are only preliminary and subject to adjustment.

SCHEDULE 7.3
INTEREST RATE PER ANNUM ON FINAL LIQUIDATION IF NOT TIMELY PAID

Twelve percent (12%)

SCHEDULE 8.2
NAMES AND LABELS OF PRODUCE

NAMES	LABELS
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

SCHEDULE 12.1.8
GROWER RFC NUMBER(S)

[REDACTED]

SCHEDULE 21
AMOUNT OF LIABILITY INSURANCE

\$

SCHEDULE 23
TERMINATION DATE OF THE AGREEMENT

[REDACTED], 2004

SCHEDULE 26.2

[REDACTED]

**NAME, ADDRESS AND FAX NUMBER OF
GROWER**

[REDACTED]

Tel: [REDACTED] Fax: [REDACTED]

[REDACTED]

SCHEDULE 3.3

**PROMISSORY NOTE(S) AND/OR
PAGARES**

NONE



APPENDIX A-3: AGREEMENT

AGREEMENT

THIS AGREEMENT is made and entered into effective as of [redacted], 200[redacted], by and between [redacted], an Arizona [redacted] ("Distributor"); and [redacted] ("Grower").

RECITALS:

A. Grower has ownership, control and/or possession of approximately [redacted] hectares of open field and [redacted] hectares of greenhouse land and farm properties near [redacted], Mexico, more particularly described on Schedule 1 attached hereto and incorporated herein ("Land"), wherein Grower intends to plant, grow, harvest, and export into the United States fruits and/or vegetables beginning November and continuing through approximately May of each of the 200[redacted]-200[redacted], 200[redacted]-200[redacted], and 200[redacted]-200[redacted] Seasons (hereinafter collectively referred to as the "Seasons") and whereas the parties agree to meet during June of 200[redacted] and 200[redacted] to confirm the parameters of the 200[redacted]-200[redacted] and 200[redacted]-200[redacted] Seasons; and

B. Distributor is in the business of distributing and selling crops in exchange for compensation and is willing to sell and distribute the crops that Grower produces on the Land during the Season upon the terms and conditions set forth herein; and

C. Distributor is willing to advance and lend to Grower certain monies for the planting, growing, harvesting, picking, packing, and shipping of the aforesaid crops during the Season under the terms and conditions hereinafter set forth.

AGREEMENT:

NOW, THEREFORE, for and in consideration of the terms, covenants, and agreements hereinafter contained, the parties hereto agree as follows:

1. Recitals Part Of Agreement. The parties hereto acknowledge and agree that the foregoing recitals are true, correct, accurate, in proper form, and fully binding on them. The recitals are incorporated by this reference as if fully set forth herein.

2. Crops. Grower, at Grower's sole cost and expense, shall plant, cultivate, and grow the fruits and/or vegetables on the Land as is set forth in Schedule 2, which is incorporated by this reference as if fully set forth herein (the "Crops"). Grower shall, at Grower's sole cost and expense, harvest, pack, export, ship, and deliver the Crops exclusively to Distributor's warehouse located in Nogales, Arizona or at such other warehouse location as Distributor shall direct. Grower shall also perform all other obligations of Grower under this Agreement at its sole cost and expense.

3. Exclusive Agreement. Grower covenants and warrants that Grower has not heretofore contracted to sell, market, consign, or otherwise deliver the Crops to any person, firm, or corporation except for 8 hectares of Greenhouse [redacted] and 80 hectares of [redacted] to [redacted] and U.S.D.A. No. 2 grade produce which is to be marketed and sold in Mexico for the Mexican National Market in the event that such produce is not marketable in the United States per the direction of Distributor. The [redacted] hectares referred to in this Section are separate and apart from the minimum [redacted] hectares which are grown exclusively for shipment to Distributor. In the event of overproduction by Grower from other growing operations and if U.S. market conditions are mutually acceptable, Grower may ship such excess production to Distributor.

INITIALS INITIALS

4. Warranty Of Title Authority. Grower hereby covenants and warrants that Grower has full and complete fee title to the Crops and Grower unconditionally guarantees Distributor that the Crops are not subject to any lien, chattel mortgage, security interest, or encumbrance of any type or form whatsoever, except for the security interest granted to Distributor herein, and that Grower has the full right, ability, and authority to deliver the Crops as provided for herein and to execute and declare this Agreement as a valid, binding, and enforceable Agreement of Grower.

5. Advances.

a. Cash Or Goods. Distributor shall and does hereby agree to advance and loan to Grower the sum of ~~50000~~ HUNDRED THOUSAND AND NO/100'S U.S. DOLLARS (\$~~500,000.00~~) in cash for the growing, planting, and cultivating of the Crops as more particularly reflected in Schedule 3 attached hereto and incorporated herein. Said amounts shall be charged to Grower's account.

b. Distributor's Discretion As To Any Additional Advances. Distributor may advance additional sums of money or pay other expenses or deliver other goods to or on behalf of Grower as Distributor in its sole discretion shall determine. These additional advances and expenses shall be charged to Grower's account and deducted from any Advances on Sales referred to in Paragraph 6 below. Distributor and Grower understand and agree that Distributor is not in the growing business and Distributor may advance cash and furnish goods in anticipation of sales commissions for the Crops and to facilitate the growing activity of Grower. Said advances and expenses shall be charged to Grower's account.

c. Promissory Notes/Pagares. Each and every one of the advances whether of cash or supplies shall bear interest at the rate charged by Distributor's lender from the respective dates which cash was paid to or materials delivered to Grower. Grower agrees to execute a promissory note and/or a "Pagare," loan agreement, and security agreement in forms satisfactory to Distributor for each and every pre-harvest advance of cash or delivery of goods. Said promissory notes and/or "Pagares" shall provide for interest at the above rate, and shall be due as specified in each Pagare. Grower recognizes that each of the promissory notes and/or the "Pagares" are totally independent of this Agreement and that Distributor in its sole discretion, may at any time demand payment or initiate collection procedures of the Promissory Notes or "Pagares." Grower waives any legal defense or exception it may have by virtue of any actual or implied rights or personal exceptions derived from this Agreement and as foreseen in Article 8, Paragraph XI of the General Law of Negotiable Instruments and Credit Operations.

6. Advances On Sales. Distributor shall, during the Seasons, as shipments are made, advance to Grower for harvesting, picking, packing, loading, and placing on board for shipping the Crops a certain amount for each package received by Distributor at Distributor's U.S. warehouse. However, in no event shall said advances exceed Fifty Percent (50%) of Distributor's gross invoice price. From the remaining 50%, Distributor shall withhold its expenses and commissions; and also deduct a minimum of \$00.00 per package sold which amounts shall be applied to reduce amounts owing by Grower under the Promissory Note/Pagare referred to in Section 5(c) above (or such additional amounts applied to this indebtedness as mutually agreed), and amounts owing for seed purchased by Grower. Said advances on sales shall be made on the Thursday of each week for the packages of Crops received by Distributor during the period of Monday through Saturday commencing with the preceding one (1) week period. Advances on Sales payments shall be charged to Grower's account. Distributor, in its sole discretion, may also pay others directly for providing the services described in this Paragraph on Grower's behalf. Said payments shall also be charged to Grower's account.

INITIALS INITIALS

7. Crossing, Freight, Duty Charges, And Other Expenses. Grower shall pay and advance all crossing charges, U.S. freight charges, duties and expenses incident to the crossing, exporting, and shipping of said Crops. All costs of reconditioning or repacking, wherever necessary, or preparing the merchandise for sale or shipment as required upon arrival at Distributor's warehouse shall be charged to Grower's account. Grower will also be responsible for procuring and paying for the costs of transportation from the Land to Distributor's U.S. warehouse or such other U.S. warehouse as Distributor shall designate. Grower shall also assure that all pallets are properly certified wood for export to the United States.

All broker's commissions and charges, palletization charges, material charges, padding charges, freight charges, cooling charges, inspection charges, product liability insurance costs, and all assessments that may be levied pursuant to any law or ordinance may at the sole discretion of Distributor be paid by Distributor for the account of Grower. Such payments shall also be charged to Grower's account.

8. Commission Charges. Distributor shall charge to Grower and be paid for the distributing and selling of such Crops a commission equal to ~~10%~~ Percent (10%) of the gross sales price of the Crops. "Gross sales price" means the total consideration paid by a customer for the purchase of the Crops. Distributor shall not charge Grower a handling or "in-end-out" charge except for Crops which are crossed through ~~warehouse~~ warehouse facilities. Distributor and Grower herein acknowledge that said commission is within industry standard or practice as they relate to charges made by distributors of crops for distribution services. The commission amount has been mutually agreed upon after consideration was given to: a) the volume of crops anticipated; b) the extent of anticipated need for pre-harvest advances; c) the placement of risk of loss after sale by Distributor; and d) after Grower having independently sought comparable commission information and bids from competitive distributors. The commissions rate set forth in this Paragraph is expressly conditioned upon the factors listed as a), b), and c) in this Paragraph and Section 17 below.

9. Charges Against Grower's Account. Unless they are excluded expressly in this Agreement, any and all advances and expenses whatsoever paid or incurred by Distributor to Grower or to third parties relating to the Crops or otherwise shall be borne by Grower and charged to Grower's account. The revenues from receipt of the sale of the Crops shall be retained by Distributor and applied against said amounts. If said sales revenues are insufficient to pay Distributor in full, then Grower shall pay Distributor as provided in Section 22 hereof.

10. Security Agreement.

a. Security Interests. To secure Grower's Obligations (as defined below), Grower, as debtor, grants, conveys, pledges, assigns, and transfers to Distributor, as secured party and lienholder, a first priority security interest, pledge, and lien in and to all of Grower's right, title, and interest, whether now owned or existing or hereafter created, acquired, or arising, wherever located in the following (collectively, the "Collateral"):

- i) All crops growing or to be grown by Grower in the future on the Land, including, without limitation, the Crops (the "Land Crops");
- ii) All crops growing or to be grown by Grower on property other than the land (the "Other Crops");
- iii) All crops purchased, delivered, or consigned to Grower (the "Purchased Crops") (the Land Crops, Other Crops, and Purchased Crops hereinafter collectively referred to as the "Crops");

INITIALS INITIALS

- iv) All proceeds of the Crops or any other property described herein;
- v) All rights under contracts of insurance covering any of the above-described property;
- vi) All rights under the Perishable Agricultural Commodities Act;
- vii) All deposit accounts or certificates of deposit arising out of the Crops or any other property described herein;
- viii) All letter of credit rights arising out of the sale or transfer of the Crops or any other property described herein;
- ix) All payment intangibles arising out of the sale or transfer of the Crops or any other property described herein;
- x) All securities and all other investment property, supporting obligations or any other contract rights or rights to the payment of money arising out of the sale or transfer of the Crops or any other property described herein;
- xi) All accounts, accounts receivable, contract rights, rights to payment, chattel paper (whether tangible or electronic), leases, instruments, notes, documents of title, and general intangibles (including, but not limited to, all payment intangibles, customer lists, goodwill and all licenses, permits, agreements of any kind or nature pursuant to which Grower possesses, uses, or has authority to possess or use property of others);
- xii) All inventory of any type, whether the inventory arises from the harvesting or severance of the Crops or whether it does not, including, without limitation, raw materials, work-in-process, or materials used or consumed in the business of Grower, whether in the possession of Grower, warehouseman, bailee, or any other person or entity. Grower and Distributor further agree that Distributor's security interest in inventory of harvested or severed Crops and any proceeds thereof shall attach at such time as the inventory of harvested or severed Crops comes under the actual or constructive control of Distributor separately and independently of and regardless of whether any security interest attached in the Crops grown on the Land;
- xiii) All machinery, furniture, fixtures, and other equipment;
- xiv) All negotiable and non-negotiable documents of title;
- xv) All monies, securities, or other property now or hereafter in the possession of or on deposit with Distributor, whether held in a general or special account or deposit, including, without limitation, any account or deposit held jointly by Grower with any other person or entity, or for safekeeping or otherwise, except to the extent specifically prohibited by law;
- xvi) All attachments, accessions, tools, parts, supplies, increases, and additions to and all replacements of and substitutions for any of the above-described property;
- xvii) All products of any of the above-described property; and
- xviii) All books and records pertaining to any of the above-described property, including, without limitation, any computer readable memory and any computer hardware or software necessary to process such memory.

INITIALS INITIALS

b. Obligations Secured. The Collateral shall secure the following (hereinafter collectively the "Obligations"):

i) Payment and performance of all obligations of Grower under the terms of this Agreement, as modified from time to time, including, without limitation, all Advances and accounts hereunder;

ii) Payment and performance of all obligations of Grower under the terms of the Promissory Note(s) and the "Pagare(s)", and all extensions, modifications, substitutions, or renewals thereof; and

iii) Payment and performance of all obligations of Grower under the terms of any other agreement between Grower and Distributor.

c. Perfection Of Security Interest. The security interest, pledge, and lien granted to Distributor at all times shall be perfected and shall be prior to any other interests in the Collateral. Grower shall act and perform as necessary and shall authenticate, file, and register all security agreements, deeds, financing statements, continuation statements, and other documents requested by Distributor to establish, maintain, and continue Distributor's perfected security interest, pledge, and lien in the Collateral. Grower, on written demand, shall promptly pay all costs and expenses of filing, registering, and recording, including, without limitation, the costs of any searches deemed necessary by Distributor from time to time to establish and determine the validity and the continuing priority of Distributor's security interest, pledge, and lien.

d. Covenants Regarding Further Information. Grower agrees that so long as this Agreement remains in effect, it will notify Distributor in writing at least sixty (60) days in advance of:

i) Any change whatsoever in the name of Grower;

ii) Any change whatsoever in the state or jurisdiction in which Grower is formed or, if debtor is an individual, in which Grower's principal residence is located;

iii) Any change whatsoever in the name(s) under which Grower conducts business, any new names under which Grower intends to do business; or

iv) Any new addresses at or from which Grower intends to do business or to keep collateral of any kind.

e. Events Of Default. Any failure to pay any principal, interest, or any other part of the Obligations when the same shall become due and payable, or any breach of any warranty, representation, covenant, or agreement made in this Agreement, or in the event that Grower shall fail to maintain its existence in good standing in its state of formation, or shall fail to be duly qualified, in good standing, and authorized to do business in each jurisdiction where failure to do so might have an adverse impact on the consolidated assets, condition or prospects of Distributor shall constitute an Event Of Default.

f. Remedies. Upon the occurrence of any Event Of Default, Distributor shall have the following rights and remedies and may do one or more of the following, to the extent permitted by applicable law:

INITIALS INITIALS

and payable;

i) Declare all or any part of the Obligations to be immediately due

ii) Without further notice or demand and without legal process, take possession of any Collateral not already in its possession, wherever found and, for this purpose, enter upon any property occupied by or in the control of Grower. Grower, upon demand by Distributor, shall assemble the Collateral and deliver it to Distributor or to a place designated by Distributor that is reasonably convenient to both parties;

iii) Upon obtaining possession of the Collateral or any part thereof, sell such Collateral at public or private sale, as permitted by applicable law. The proceeds of such sale, after deducting therefrom all expenses of Distributor in taking, storing, and selling the Collateral (including, without limitation, attorney's fees) shall be applied to the payment of the Obligations, and any surplus thereafter remaining shall be paid to Grower or any other person that may be legally entitled thereto. In the event of a deficiency between such net proceeds from the sale of the Collateral and the total amount of the Obligations, Grower, upon demand, shall promptly pay the amount of such deficiency to Distributor;

iv) Distributor shall have all the rights and remedies afforded a secured party under the Uniform Commercial Code and all other remedies allowed under applicable law;

v) Distributor may bring an action or demand with a court of competent jurisdiction to obtain possession of and to secure its rights in the Collateral; and

vi) Distributor may bring an action for indemnification for breach of this Agreement in an amount equal to: i) the Commission; ii) the In-and-Out; iii) the Pick-and-Pack; iv) the Expenses; v) the interest accrued on the Advances; vi) the principal due on the Advances; and vii) any other deductions.

g. Power Of Attorney. Grower hereby appoints Distributor as its true and lawful attorney-in-fact, with full power of substitution to do any one or more of the following:

i) Demand, collect, receive, receipt for, sue, and recover all sums of money or other property which now or hereafter become due, owing, or payable from the Collateral;

ii) Execute, sign, and endorse any and all claims, instruments, receipts, checks, drafts, or warrants issued in payment for the Collateral;

iii) Settle or compromise any and all claims arising under the Collateral, and, in the place and stead of Grower to execute and deliver its release and settlement for the claim;

iv) File any claim or claims or to take any action or institute or take part in any proceedings, either in its own name or in the name of Grower, or otherwise, which in the discretion of Distributor may seem to be necessary or advisable; and

v) Execute and/or authenticate any documents including, but not limited to, a UCC Financing Statement or a UCC Amendment to Financing Statement or Continuation Statement necessary to perfect or continue the security interest. This power is a power coupled with an interest and is given as security for the obligations and the authority hereby conferred is and shall be irrevocable and shall remain in full force and effect until renounced by Distributor.

INITIALS

INITIALS

h. Distributor's Right To Setoff. Grower grants Distributor as further security for the Obligations, a security interest and lien in any credit balance and other money now or hereafter owed Grower by Distributor. Grower agrees that Distributor may, without prior notice or demand, charge against any such credit balance or other money in the amount owing upon the Obligations, whether due or not.

i. Indemnification. Grower agrees to indemnify, defend, protect, and hold harmless Distributor and its affiliates, and their respective successors, assigns and shareholders, and the directors, officers, employees, agents, and attorneys of the foregoing and each of their respective spouses (collectively the "Indemnified Parties") for, from, and against any and all other liabilities, obligations, losses, damages, penalties, actions, judgments, suits, claims, costs, expenses, and disbursements of any kind or nature whatsoever (including, without limitation, the fees and disbursements of counsel for such Indemnified Parties in connection with any investigative, administrative, or judicial proceeding commenced or threatened, whether or not such Indemnified Parties are designated parties thereto) that may be imposed on, incurred by, or asserted against the Indemnified Parties, in any manner relating to or arising out of this Agreement and the "Pegares".

11. Pledging Of The Collateral/Subordination Or Waiver Of Grower's Rights. Grower and Distributor recognize and agree that Distributor may find it beneficial to obtain financing in order to make Distributor's advances to Grower pursuant to Paragraphs 5, 6, and 7 hereof as well as to finance or refinance Distributor's own overhead and operations involving advances to other growers. In order to facilitate Distributor's acquisition of such financing, Grower consents to Distributor pledging all of the above collateral or assigning Distributor's security interest in all of the above collateral to any person or entity including a financial institution of Distributor's choice. Grower further agrees to waive or subordinate Grower's rights against Distributor, including, but not limited to, Grower's rights against Distributor under the trust provisions of the Perishable Agricultural Commodities Act of 1930 in favor of a financial institution if such a waiver or subordination is required by a financial institution as a condition of providing financing to Distributor. Distributor may also factor Grower's accounts receivable. Distributor agrees to bear the cost of interest on said borrowings. Grower agrees to execute such documentation as may be necessary to effect such a pledge, assignment, waiver, or subordination.

12. Grower's Consent To Pooling Of Collateral And Release From Duty To Supervise. Distributor has advised Grower that in order to secure Distributor's financing, Distributor may combine or "pool" Distributor's collateral, Grower's Collateral and similar collateral of other Growers (hereinafter referred to as the "Other Growers") who have contracts with Distributor (hereinafter referred to as the "Other Grower Contracts"). GROWER EXPRESSLY CONSENTS TO SUCH COMBINATIONS OR "POOLING" OF COLLATERAL. Notwithstanding the foregoing provisions however, Grower shall only be responsible in excess of Grower's collateral for repayment of its debt and obligations to Distributor and not the debts or obligations of other Growers.

Distributor has also advised Grower that Distributor will finance or refinance Distributor's own overhead and operations, and make advances similar to those described in Paragraphs 5, 6, and 7 of this Agreement to the Other Growers pursuant to the terms of the Other Growers Contracts. The financing of Distributor's overhead and operations and advances to the Other Growers will come from the same line of financing Distributor will use to make advances to Grower under this Agreement. In some circumstances, therefore, Grower's Collateral may be used to secure funds advanced to Distributor or Other Growers. Conversely, Distributor's and Other Growers' Collateral may be used to secure funds advanced to Grower. Furthermore, Grower and Distributor agree that it is foreseeable or possible that some or all of these advances could be used by Distributor, Grower, or the Other Growers in breach of this Agreement or the Other Grower Contracts for purposes entirely apart from the operations set forth in this Agreement or in the Other Growers Contracts.

INITIALS

INITIALS

Distributor expressly disclaims any responsibility for supervising the actual use of funds advanced to Distributor, to Grower under this Agreement or to the Other Growers under the Other Grower Contracts.

AFTER BEING ADVISED OF THE FOREGOING, GROWER EXPRESSLY RELEASES DISTRIBUTOR FROM ANY AND ALL DUTIES OR RESPONSIBILITIES OF SUPERVISING OR MONITORING THE USE OF FUNDS ADVANCED TO DISTRIBUTOR, TO GROWER, OR TO OTHER GROWERS. GROWER ALSO EXPRESSLY RELEASES DISTRIBUTOR FROM ANY OR ALL CLAIMS ASSOCIATED WITH A CLAIMED FAILURE TO SUPERVISE OR MONITOR THE USE OF FUNDS ADVANCED TO DISTRIBUTOR, TO GROWER, OR TO THE OTHER GROWERS.

13. Grower's Exclusive Shipment To Distributor Under Certain Labels. Grower represents to Distributor that the Crops grown pursuant to the provisions of this Agreement will be shipped safely and completely under the names and labels designated below.

NAME



LABEL



All Crops containing the names and labels hereinabove designated, shall be exclusively shipped to Distributor. Grower covenants and warrants that Grower has not heretofore contracted to sell, market, consign, or otherwise deliver the Crops to any other person or entity.

14. Consignment And Shipment To Distributor. Grower covenants and agrees that Grower will consign and ship exclusively to Distributor all of the Crops grown by Grower as heretofore stated. Grower agrees to ship to Distributor export quality fruit, which meets United States Department of Agriculture Standards for U.S. No. 1 grade with corresponding maturity and marketing and label standards as required for entry into the United States and Canada. Grower agrees to ship Distributor Crops of merchantable quality which meets the quality, weight and condition standards established for entry into destination markets and agreements with overseas customers. Neither Grower nor Agent shall be obligated to affix lot numbers to each box of Crops packed by Grower, or under Grower's direction. With the prior consent of Distributor, Grower may sell the Crops on the Mexican National Market. If there is a balance due from Grower to Distributor, Grower shall pay the proceeds from the sale of the Crops on the Mexican National Market after deducting the pick-and-pack costs, boxes, and freight within forty-five (45) days after the date of sale.

15. Grower Reporting And Compliance With Instructions.

a. Grower shall report his manifests or shipments to Distributor immediately after departure or as timely as is necessary to comply with applicable federal and state regulations. Failure of Grower to report the shipment of Produce as provided herein or failure to strictly comply with the picking, packing, and shipping instructions as provided herein shall allow Distributor, in its sole discretion, to refuse to pay to Grower or third parties the amounts specified in Paragraphs 5a, 5b, 6, or 7 hereof.

b. Grower shall periodically receive instructions from Distributor with reference to the picking, packing, and shipping of the Crops. Grower shall comply strictly with the

INITIALS INITIALS

picking, packing, and shipping instructions furnished by Distributor including, but not limited to, halting or ceasing the shipping of the Crops, if in the sole discretion of Distributor, the market conditions require the same. Grower also agrees to indemnify and hold Distributor harmless from losses and expenses, including attorneys' fees and costs, incurred as a result of claims, suits, demands, or other actions of third parties against Distributor arising out of Grower's breach of any provisions of this Paragraph 15.

c. Distributor shall have the right to have an agent or representative present on the Land or at any shipment or packing point at any time during the growing, picking, packing, and shipping of said Crops, and shall, if it so desires, specify and direct the type of packing and selection of produce as it may deem to be to the best interest of the parties. Distributor's agent shall have the right to review, inspect, accept, or reject Crops at the time of loading or dispatch in Mexico that is not in compliance with agreed quality, weight, and condition standards. Grower shall have the right to have an agent or representative present at Distributor's office at any time during the selling of the Crops and the agent or representative shall have access to all of Distributor's records concerning the sale of the Crops during all reasonable hours.

d. Grower will immediately notify Distributor in writing of any situation which might interfere with Grower's ability to comply with its harvesting schedule, which may affect the quality or marketability of the Crop, or to remove or dispose of the Crop including, without limitation, the levy of any legal process against the Crop or the property; Grower's insolvency or its filing of a petition in bankruptcy, or the adoption of any marketing order, arrangement or procedure affecting the crop, whether governmental or otherwise.

16. Other Activities Of Distributor. It is understood and agreed by the parties that Distributor will deal with other growers on terms that are the same or different than the terms on which Distributor has agreed with Grower in this Agreement, and, as such, may compete with Grower.

17. Sale Of The Produce.

a. No Guaranty. Grower hereby acknowledges that Distributor has made no representations, warranties, or guarantees to Grower or any other person regarding Distributor's ability to market the Crops or the price Distributor will be able to obtain for the Crops.

b. Distributor Reporting To Grower. Distributor shall keep Grower informed about marketing conditions and prices periodically, and shall report to Grower the inspections and price of all produce received. Distributor shall furnish copies of the account sales to Grower upon reasonable request. It is understood that the account sales only indicate the sale price at the time of shipment but such account sales are subject to collection, adjustments, credits, and final payment as provided herein. Distributor and Grower also acknowledge that daily fresh produce prices quoted in the trade and press including such publications as the Market News Services and/or other publications of the U.S.D.A. or other relevant state agencies or agencies and associations in Mexico are compiled in such a manner that they are subject to manipulation by buyers and sellers of produce to indicate a higher or at times lower price than is actually being realized in the true majority of sales. Further, such publications may not accurately reflect condition of produce, market demand or other conditions such as regulatory action ultimately affecting the price at which a specific lot of produce is sold in a specific geographic market. The parties agree, therefore, that while these prices may be used as one factor in setting a price at which Distributor will sell Grower's produce, Distributor does not guarantee that such prices will be obtained. In no event is this Agreement to be deemed or construed as a purchase of the Produce by Distributor or as a guarantee of any specified price.

INITIALS

INITIALS

c. Sole Discretion Of Distributor. Distributor shall, to the exclusion of Grower and in its sole discretion, judge when and to whom, upon what terms, and for what prices the Produce shall be sold. Distributor shall endeavor to obtain the best prices for the kind and quality of crops produced by Grower, but Distributor makes no guarantee as to prices actually received for the Crops, or that prices received will actually yield a positive return for Grower. It is expressly understood and agreed that Distributor may, in its sole discretion: 1) transfer title to the Crops; 2) sell or consign the Crops through local or destination brokers when deemed necessary, at Grower's expense; 3) sell the crops on a F.O.B., delivered, consignment, re-consignment, open, price-after-arrival, joint account, or delayed billing basis; 4) enter into supply contract with customers at fixed prices which may be above or below prices on the open market for comparable crops; set weekly, monthly, quarterly, or annual prices, set ceiling or lid prices; enter into ad or promotional contracts with or without rebate provisions with customers; sign continuing commodity guarantees on behalf of Grower as deemed necessary; and pay promotional allowances, incentives or rebates to customers, at Grower expense; 5) obtain shipping point inspections, at Grower's expense, whenever Distributor deems it commercially reasonable or prudent to do so; 6) convert the terms of sale from F.O.B. to consignment or to grant price adjustments, credits or allowances due to market changes or condition or quality claims on arrival; 7) obtain federal, state, third party, in house, or other inspections as Distributor, may in its sole discretion, deem appropriate, and to waive Grower's rights to such inspections when Distributor deems it necessary and practical to do so, in its sole judgment; and 8) take any other action or incur any expense on Grower's behalf that Distributor, in its sole judgment, deems necessary under the circumstances to effectively market the Crops. Distributor shall not be liable for errors in judgment in the exercise of its marketing obligations and prerogatives set forth herein provided that Distributor has acted in good faith.

d. Sales Through Brokers And Price Credits. Distributor may also sell through brokers or sell through terminal market or other auctions. Distributor may sell to buying brokers or re-billing distributors and may deduct the brokerage paid to the buying brokers or re-billing distributors from the sales price and bill the buying brokers and re-billing distributors a price net of brokerage. Distributor may in its sole discretion, and without consulting with Grower, grant buyers of the Crops, including buying brokers and re-billing distributors, credits against the Invoice price of the Crops for any reason, including but not limited to, market decline or quality which Distributor in its sole discretion deems: 1) reasonably necessary to effectuate the sale of the Crops at destination; 2) reasonably necessary to prevent unacceptable delays in resale at destination; or 3) reasonably necessary to change an otherwise impractical sales price. Distributor may also grant such adjustments without requiring inspections or other supporting documentation from customers. Distributor shall make every reasonable effort to provide written notice to Grower of all adjustments and allowances and the reasons for such adjustments or allowance within 24 hours or as soon as is practicable thereafter of notification by receiver of a problem. Distributor is also authorized to abandon or dump shipments without obtaining an official dump certificate or other evidence to prove the Crops were without commercial value when in the exercise of Distributor's sole discretion abandonment or dumping is warranted. Pursuant to 7 C.F.R. § 46.32(e), Grower acknowledges and approves the sale of the Produce to companies related to Distributor, specifically [REDACTED]

e. Collections. Distributor will make all collections of and receive all payments for the Crops sold. Any loss as a result of uncollectible accounts receivable shall be borne by Distributor. Distributor, in negotiating for the price of its services, has factored this attachment of risk of uncollectible accounts receivable into the determination of commissions to be charged. Distributor is authorized to take, in its own name, all steps that, in its judgment, are necessary to enforce collection, including referral to collection agencies and filing, prosecution, compromise, defense and settlement of claims and lawsuits as well as proceedings before Federal and State agencies or bureaus having jurisdiction over these matters. Distributor is authorized to pursue

INITIALS INITIALS

claims and actions, in its own name, under the Perishable Agricultural Commodities Act (7 U.S.C. 499a-499s) ("PACA") and under Chapter 7 of Division 20 of the California Food and Agricultural Code. It is also authorized to take, in its own name all steps that in its judgment are necessary to obtain payment of freight claims, including, without limitation, referral of these matters to claims agents for collection or filing and the prosecution of lawsuits. All expenses and costs incurred by Distributor to enforce collection of any sale or to obtain payment of any freight claims shall be the sole responsibility of the Distributor.

f. Marketing Orders, Pooling And Commingling. Distributor shall have the right to comply with all marketing orders, prorated orders, and marketing agreements that have been made or may be made pursuant to any law or ordinance. Distributor may, in its absolute discretion, co-mingle, pool, and mix in any individual shipments any or all of the Crops delivered to it hereunder with any other crops of like kind or quality, and in a reporting and accounting for the sale of said crops so pooled, Distributor need indicate only the average prices received from such sale or sales.

g. Discontinuance Of Marketing Or Selling. Notwithstanding anything to the contrary contained herein, Distributor shall have the right at any time or times to discontinue the marketing or selling of the Crops at any time or times when, in its sole and absolute judgment, the Crops are not fit or suitable for shipment or sale, or in the event that the market price then prevailing for the Crops are less than any duties imposed plus the actual costs of picking, packing, hauling and shipping the same and Distributor's associated commissions and overhead, it being understood that Distributor may refuse to accept any shipment from Grower in Nogales, Sonora, Mexico or at the time of loading and dispatch in Mexico and return the shipment to Grower at Grower's expense. Distributor shall have the right to resume the selling and marketing of the Crops whenever, in its sole and absolute judgment, the market price therefore is sufficient to pay for said expenses. Notwithstanding the foregoing, Grower shall be permitted to market any crops, that are not acceptable for export to the United States in the Mexican National Market, provided, that Grower shall not market such unacceptable crops under any of Distributor's labels, cartons, stickers, packaging, or advertising materials.

18. Grower Representations And Warranties And Insurance. Grower hereby represents and warrants that:

a. [REDACTED] is duly organized and existing under the laws of the Republic of Mexico, and its R.F.C. Number is [REDACTED]. Grower is the owner of the Crops, and/or has full power and authority to sell and deliver the Crops and unconditionally guarantees that the Crops are not subject to any lien, chattel mortgage or encumbrance of any type or form whatsoever except for the security interest granted to Distributor herein, and that Grower has the full right, ability, and authority to enter into this Agreement and to declare this Agreement as a valid, binding, and enforceable obligation of Grower. Grower shall provide Distributor with a certified copy of a power of attorney granting Grower's individual signatory to this Agreement the power to negotiate and execute this Agreement on Grower's behalf.

b. Grower is not presently a party, nor during the term of this Agreement will become a party, to any other contract or agreement providing for the packing, selling, or marketing of the Crops.

c. Grower will not transfer ownership of the Crop to anyone without notice and express written approval of Distributor.

d. The Crops are not subject to any claims for commissions or royalties deriving from the use of trademarks, tradenames or patents from the manufacturer or any distributor of

INITIALS INITIALS

any seeds or other products used in the planting, growing or harvesting of the Crops. Grower is entitled to the complete use and possession of the Land and Distributor is granted the right of entry and full access to the Land in the performance of its obligations hereunder. Grower has the financial resources, technical agribusiness experience, licenses, permits and authorizations necessary to perform Grower's duties herein (including use of appropriate methods of cultivation, irrigation, and fumigation of Crops) as well as to perform Grower's grading, packing, cooking, harvesting, and hauling duties to ensure that the Crop will be of good and marketable quality and in the state of maturity required by Distributor.

e. The Crops comply with, and are not adulterated, or misbranded within the meaning of the Federal Food, Drug and Cosmetic Act, as amended (21 U.S.C. §§ 301 et seq.) (the "Act"), the Federal Insecticide, Fungicide and Rodenticide Act, and any regulations issued thereunder or any other federal, state, or local laws, statutes, rules or regulations relating to, without limitation, health, hygiene, environmental conditions, adulterated or misbranded food and is not an article that may not, under the provisions of 21 U.S.C. § 331, be introduced into interstate commerce.

f. Grower will exercise extreme caution and demonstrate all due diligence in applying or using any "Economic Poison" (as defined in Section 12753 of the California Food and Agricultural Code) on or about the Land; any pesticide as defined in FIFRA will be registered and classified for use on the Crops, and used in a manner consistent with its labeling, and will not be adulterated, misbranded, or applied in the production of the Crops in violation of the requirements of FIFRA or any regulations thereunder.

g. The Crops comply with any and all other federal, state and local laws and regulations regarding herbicides, pesticides, fungicides, insecticides, rodenticides, and other chemical products and hazardous materials, and with all applicable labor laws.

h. The Crops have been produced and packaged in full accordance with any and all laws and regulations governing packaging, labeling, and weights and measures, and any and all other applicable federal, state or local laws, rules, regulations, or orders applicable to these items.

i. Grower has programs in place to ensure compliance with the Good Agricultural Practices ("GAPs") and Good Manufacturing Practices ("GMPs") as described in the Food and Drug Administration "Guide to Minimize Food Safety Hazards for Fresh Fruits and Vegetables" and in Title 21 of the Code of Federal Regulations. Such compliance shall be at Grower's expense. Grower shall also be responsible for and pay for any expense related to obtaining written verification of such compliance by an independent auditor designated by customers of Distributor.

19. Risk Of Loss On Produce/Indemnification. Until such time as the Crops are delivered to the receiver, title to the Crops shall remain with Grower. Distributor shall bear no risk of loss to the Crops. Either the receiver of the Crops or Grower shall bear the entire risk of loss or damage to the Crops. Grower agrees to indemnify and hold Distributor harmless for, from, and against any and all loss or damage to the Crops, as well as from any consequence thereof sustained while risk of loss remains upon Grower or the receiver of the Crops.

20. Trademarks, Trade Names And Corporate Names. Grower shall, not without prior written consent of Distributor, register, use, or display any of Distributor's corporate name, trademarks, symbols, trade names, or other intellectual property rights, and the logos associated therewith or any name, symbol or mark confusingly similar thereto. The use of any of Distributor's trademarks, symbols, trade names, or other intellectual property rights by Grower shall inure to Distributor's benefit and shall not give Grower any proprietary rights therein. Grower agrees that

INITIALS INITIALS

without prior written consent from Distributor, it will not use or sell to any third party any extra packing material, including cartons, stickers, and labels except as expressly authorized by Distributor and upon termination of this Agreement. Grower will immediately return any excess packaging materials, cartons, stickers, and labels in accordance with Distributor's instructions at Grower's expense to Distributor's warehouse in Nogales, Arizona.

21. Delays/Force Majeure. Neither party shall be responsible for any loss or damage resulting from any delay or failure in performing any provision of this Agreement, if the delay or failure results from: a) transportation shortages, inadequate supply of labor, organized labor, material or energy, or the voluntary foregoing of the right to acquire or use of any of the foregoing in order to accommodate or comply with the orders, requests, regulations, recommendations or instructions of any government or any department or agency thereof; b) compliance with any law, ruling, order, regulation, requirement or instruction of any government or any department or agency thereof; c) acts of God; or d) fires, strikes, labor troubles, embargoes, war or riot (a "Force Majeure Event"). Any delay resulting from any of such Force Majeure Event shall extend performance accordingly or excuse performance in whole or in part, as may be necessary. Distributor shall be excused from performing its obligations, either in part or total due to a Force Majeure Event. In such event, Distributor shall give notice of such cause to Grower and may elect in Distributor's sole and absolute discretion to: i) terminate this Agreement; ii) reasonably cooperate with Grower to attempt to make performance possible, practical, or lawful; or iii) by notice to Grower, allowing Grower to harvest, pack, and/or market pursuant to this Agreement only that portion (if any), of the Crops which Distributor, in its absolute and sole discretion so elects. Upon notice of election of option ii) or iii) in this Section by Distributor to Grower, then Grower shall once again be obligated to deliver to Distributor such Crops.

22. Liquidations/Accounting.

a. Preliminary Liquidations. Except with regard to disputed invoices which shall be liquidated when settled, Distributor shall provide Grower a detailed liquidation statement showing the amounts invoiced, received, and/or collected as payment for the sale of the Produce, and the deductions of amounts owed to Distributor by Grower, including, without limitation, the following items, which shall be deducted in the following order of priority or such other order as Distributor shall desire, in its sole discretion: i) the Commission; ii) the In-and-Out (related to Texas crossings); iii) the Advances on Sales; iv) the Expenses; v) the interest accrued on the Advances; vi) the principal due on the Advances; vii) any other deductions; and viii) amounts due from Grower to Distributor pursuant to any other agreement between Distributor and Grower. It is expressly understood and agreed that each shipment and sale will not be liquidated separately, but a running accounting by invoice shall be made on the 15th and 30th day of every month during the Seasons for revenues and deductions related to the Crops sold during the period greater than thirty-one (31) days from the date of the preliminary liquidation. After such preliminary liquidations have been rendered, any balance found due and owing to Grower shall forthwith be paid by Distributor to Grower. In the event there is a balance due and owing from Grower to Distributor by reason of the monies advanced hereunder, Distributor shall apply any revenues received from sale of the Produce, including pellets and pre-cooling revenues to said amount and shall carry over the balance to the following preliminary liquidation date.

b. Final Liquidations. Except with regard to disputed invoices which shall be liquidated when settled, Distributor shall within forty-five (45) days of the later of: i) the termination of this Agreement for any reason; or ii) the cessation of shipments of the Crops to Distributor for any reason, give and report in writing to Grower a final liquidation which shall include a true, complete, and detailed account and report of all matters and things pertaining to the handling, distribution, and sale of the Crops made by Distributor, as provided in this Agreement, indicating and setting forth all sales and expenses incurred therein. Distributor shall account for sales on a lot-by-lot basis and shall prepare a liquidation statement of each lot showing the sale or disposition of all Crops received by Distributor.

INITIALS

INITIALS

Distributor shall deduct from the Gross Sales Price, sales commissions, repayment of any advances made by Distributor to Grower, and other ordinary expenses of sale as provided in this Agreement;

c. Payments. After such account has been rendered, any balance found due and owing to Grower as provided herein shall forthwith be paid by Distributor to Grower. In the event there is found a balance due and owing from Grower to Distributor, Grower shall forthwith pay said sum to Distributor and in no event later than June 30 of each of the Seasons. If any balance due from Grower to Distributor is not paid within thirty (30) days of the final accounting, then Grower agrees to pay interest on the balance due at the default rate as specified by Distributor's lender until paid. The parties acknowledge that Distributor's lender requires that all amounts owing by Grower under this Agreement be paid in full as a precondition to loaning funds to Distributor for subsequent seasons; therefore, in the event that all sums are not paid by Grower by this June 30 timeframe, Distributor, at its option and without waiving any claims against Grower, may elect to terminate this Agreement.

23. Grower's Non-Payment. If Grower does not pay said sum to Distributor forthwith, Grower hereby agrees that Distributor may, in the exercise of Distributor's sole discretion, either pursue any legal remedies available to Distributor.

24. Default. If Grower defaults on or breaches its obligations under this Agreement, and after fifteen (15) days' written notice from Distributor, fails to cure such breaches, then Distributor, notwithstanding any other provisions of this Agreement, shall be entitled to: I) terminate this Agreement upon written notice to Grower; II) immediate payment of all monies due under this Agreement with interest at the default rate as specified by Distributor's lender from the date of said breach; and III) all other damages which are legally recoverable. These rights are cumulative to any and all other rights that Distributor may otherwise have under this Agreement or the law.

25. Not A Partnership Or Joint Venture. It is expressly understood and agreed that Distributor is not in any manner to be, or considered as a partner or joint venturer of Grower for any reason including, but not limited to, the advances and loans to be made by Distributor to Grower as set forth in this Agreement. Grower shall have no right to act on behalf of or in the name of Distributor and Grower shall have no power or authority to bind Distributor. Distributor and Grower are each separate entities separately and independently conducting their own business, and this Agreement does not serve to create, nor shall it imply a partnership, joint venture, or joint-employer relationship between them. Each party is to remain as to the other party an independent contractor, responsible for direction of and complete control of its own respective employees or contracted employees. Each party shall maintain its own worker's compensation and general liability coverage as required by law and generally deemed sufficient for its type of business, and agrees to protect, defend and hold harmless the other against any injury, labor, employment or damage claims of any sort whatsoever arising out of the operation of its own business or the actions, error or omissions of its agents, servants, representatives and/or employees. Neither party shall have any authority over the employees, agents, or contractors of the other.

26. Incapacity Of Grower. In the event Grower or its managing agent shall become incapacitated or die at any time between the planting and delivery of all of the Crops at Nogales, Arizona, during the Season covered by this Agreement, the survivors of Grower shall take over in the name of and on behalf of the deceased Grower or his estate, and complete the planting, growing, and harvesting, and shall be bound by the terms of this Agreement.

27. Assignment By Distributor. It is expressly understood and agreed that Distributor may, in its sole discretion and without permission of Grower, assign any and all rights and obligations hereunder to a third party at any time during the term of this Agreement.

INITIALS

INITIALS

28. **Governing Law.** This Agreement shall be deemed to be made under, shall be construed in accordance with, and shall be governed by the internal substantive laws of the State of Arizona (without reference to choice of law principles).

29. **Waiver Of Jury Trial, Venue, Jurisdiction And Service Of Process.** Each of the parties hereto shall and do hereby waive trial by jury to the fullest extent permitted by law. The Parties irrevocably and expressly submit to the jurisdiction of: a) the competent courts of the State of Arizona in the City of Nogales, Arizona; or b) the competent courts of the United States of America, District of Arizona, Tucson, Arizona, thereby expressly waiving any other U.S. jurisdiction or venue to which they may be entitled. Grower agrees that a final judgment in any such action or proceeding shall be conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law. Nothing herein contained shall affect the right of Distributor to serve legal process in any other manner provided by law or effect the right of Distributor to bring any action or proceeding against Grower or its property in the courts of any other jurisdictions. To the extent that Grower has or hereafter may acquire any immunity from jurisdiction of any court or from any legal process with respect of itself or its property, Grower irrevocably waives such immunity.

30. **Attorney Fees And Costs.** In connection with any arbitration, mediation, or judicial proceedings by any party regarding controversies and/or claims under this Agreement, the prevailing party in said proceeding shall be entitled to recover its actual attorney's fees, for all legal counsel, at pre-trial, trial, and appellate stages, all expenses and costs, including, but not limited to, depositions, witness fees, travel and lodging, and any other expenses incurred in connection with said proceedings. As used in this Agreement, "actual attorney's fees" shall mean the full and actual cost of any legal services actually performed in connection with the matters involved calculated on the basis of the usual hourly fees charged by the attorneys performing such services. Any party in whose favor a judgment has been entered shall also be entitled to all post-judgment attorney fees, costs, and expenses incurred in the collection and enforcement of such a judgment.

31. **Entire Agreement.** This Agreement represents the entire agreement of the parties with respect to its subject matter, and all agreements, oral or written, entered into prior to this Agreement are revoked and superseded by this Agreement. No representations, warranties, inducements, or oral agreements have been made by any of the parties except as expressly set forth herein or in other contemporaneous written agreements. This Agreement may not be changed, modified, abandoned, or rescinded, except in a writing, signed by all parties hereto, and any attempt at oral modification abandonment or rescission of this Agreement shall be void and of no effect.

32. **Waiver.** Neither the failure nor any delay on the part of a party to exercise any right, remedy, power, or privilege precludes any other or further exercise of the same or of any right, remedy, power, or privilege, nor shall any waiver of any right, remedy, power or privilege with respect to any occurrence be construed as a waiver of such right, remedy, power or privilege with respect to any other occurrence. No waiver shall be effective unless it is in writing and is signed by the party asserted to have granted such waiver.

33. **Severability.** If any one or more of the covenants, agreements, provisions or terms of this Agreement shall be for any reason whatsoever be held invalid or unenforceable then such covenants, agreements, provisions, or terms shall be deemed severable from the remaining covenants, agreements, provisions, or terms and shall in no way affect the validity or enforceability of the other provisions of this Agreement. Further, if a court of competent jurisdiction determines that any provision of the Agreement is invalid or unenforceable as written, such court may interpret, construe, rewrite, or revise such provision, to the fullest extent allowed by law, so as to make it valid and enforceable consistent with the intent of the parties hereto.

INITIALS INITIALS

34. Notices. Any notice provided for herein shall be deemed to be given, made, and received when delivered against receipt or when sent by facsimile, or five (5) days after being sent by registered or certified U.S. Mail return receipt requested, postage prepaid, to Grower or Distributor at the following addresses:

DISTRIBUTOR

[Redacted address for Distributor]

Telephone: (520) [Redacted]
Facsimile: (520) [Redacted]

GROWER

[Redacted address for Grower]

Telephone: [Redacted]
Facsimile: [Redacted]

The above addresses may only be changed by giving written notice of such change of address in the manner provided for above to all of the other parties hereto. The failure or refusal of a party to accept or acknowledge receipt shall fulfill the requirement of notice.

35. Schedules/Exhibits. All Schedules and/or Exhibits attached hereto and referred to in this Agreement are hereby incorporated into this Agreement and made a part hereof.

36. Counterparts. This Agreement may be executed in any number of counterparts, including facsimiles thereof, each of which shall be deemed an original, but all of which shall constitute one and the same instrument. Except as provided in Paragraph 40 below, this Agreement shall become binding when one or more counterparts hereof, individually or taken together, shall bear the signatures of all of the parties reflected hereon as signatories.

37. Headings. Headings contained in this Agreement are inserted only as a matter of convenience and in no way define, limit, extend or describe the scope of this Agreement or any provision hereof.

38. Successor In Interest. Except as otherwise provided herein, all provisions of this Agreement shall be binding upon, inure to the benefit of, and be enforceable by and against the respective heirs, executors, administrators, personal representatives, successors and assigns of any of the parties to this Agreement.

39. Number Of Days. In computing the numbers of days for purposes of this Agreement, all days shall be counted, including Saturdays, Sundays and holidays in the State of Arizona; provided, however, that if the final day of any time period falls on a Saturday, Sunday or holiday, then the final day shall be deemed to be the next day that is not a Saturday, Sunday or holiday.

40. Grower's Acceptance. If Grower's Crops are delivered to Distributor after Grower's receipt of this Agreement, Grower will be deemed to have agreed to be bound by all of the terms and conditions set forth herein, regardless of whether either or both parties have signed and delivered a copy of the executed Agreement to the other. This Agreement shall be deemed to be a statement of the terms and conditions upon which Distributor will handle Grower's Crops during the current Season within the meaning of 7 C.F.R. § 46.32.

INITIALS

INITIALS

41. Independent Counsel/Translation And Controlling Version.

a. English Version. GROWER ACKNOWLEDGES THAT [REDACTED] REPRESENTS DISTRIBUTOR AND THAT GROWER HAS OR HAS HAD AN OPPORTUNITY TO CONSULT WITH INDEPENDENT COUNSEL OF GROWER'S CHOICE REGARDING THIS AGREEMENT AND THE TERMS AND CONDITIONS HEREOF AND THAT ANY RULE OF CONSTRUCTION TO THE EFFECT THAT AMBIGUITIES ARE TO BE RESOLVED AGAINST THE DRAFTING PARTY SHALL NOT APPLY TO THE INTERPRETATION OF THIS AGREEMENT. GROWER FURTHER ACKNOWLEDGES THAT GROWER HAS OR HAS HAD THE OPPORTUNITY TO HAVE THIS AGREEMENT TRANSLATED INTO THE SPANISH LANGUAGE AND THAT IF IT HAS BEEN SO TRANSLATED, THE ENGLISH VERSION SHALL CONTROL OVER THE SPANISH TRANSLATION. GROWER AGREES, IN ANY EVENT TO BE BOUND BY THE TERMS OF THIS AGREEMENT.

b. Spanish Version. AGRICULTOR RECONOCE QUE EL BUFETE DE [REDACTED] REPRESENTA AL DISTRIBUIDOR Y QUE AGRICULTOR HA TENIDO OPORTUNIDAD DE CONSULTAR UN ABOGADO INDEPENDIENTE DE SU PREFERENCIA EN CUANTO A ESTE CONTRATO Y LOS TERMINOS Y CONDICIONES DE AQUI Y QUE REGLAS DE CONSTRUCCION AL EFECTO QUE AMBIGUEDADES SERAN RESUELTAS CONTRA LA PARTE REDACTORA NO SERA APLICADO AL INTERPRETACION DE ESTE CONTRATO. AGRICULTOR ADEMAS RECONOCE QUE HA TENIDO LA OPORTUNIDAD DE QUE ESTE CONTRATO SEA TRADUCIDO AL IDIOMA ESPAÑOL Y QUE SI ESTE ES TRADUCIDO, LA VERSION EN EL IDIOMA INGLES TENDRA CONTROL SOBRE LA TRADUCCION EN ESPAÑOL. AGRICULTOR CONCUERDA, EN CUALQUIER CASO, QUE SE OBLIGA POR LOS TERMINOS DE ESTE CONTRATO.

IN WITNESS WHEREOF, the parties hereto have set their hands the day and year first above written.

GROWER:

[REDACTED]

By: [REDACTED]
Its: Authorized Representative

DISTRIBUTOR:

[REDACTED]

By: [REDACTED]
Its: Member

INITIALS INITIALS

STATE OF ARIZONA)
County of Santa Cruz) ss.

This Agreement was acknowledged before me, the undersigned Notary Public, this day of _____, 2000, by _____ the Authorized Representative of _____ a Mexican _____ on behalf of said association.

Notary Public

Seal & Commission Expiration Date:

STATE OF ARIZONA)
County of Santa Cruz) ss.

This Agreement was acknowledged before me, the undersigned Notary Public, this day of _____, 2000, by _____ Arizona _____ on behalf of said _____

Notary Public

Seal & Commission Expiration Date:

INITIALS INITIALS

SCHEDULE 1

LOCATION/DESCRIPTION OF FARM

I. Name of Farm:

[REDACTED]

Address of Farm:

Street:

City:

State/County:

[REDACTED]

Telephone Number(s):

Facsimile Number(s):

Grower's R.F.C. Number:

[REDACTED]

II. Legal Description of Farm: See drawings attached hereto and incorporated herein.

Clave Catastral:

[REDACTED]

INITIALS

INITIALS

SCHEDULE 3

SCHEDULE OF ADVANCES

I. Money Advances To Grower:

<u>Amount</u>	<u>Approximate Date of Advance</u>
\$ 00,000.00	September 15, 200
\$ 00,000.00	September 22, 200
\$ 00,000.00	September 29, 200
\$ 00,000.00	October 6, 200
\$ 00,000.00	October 13, 200
\$ 00,000.00	October 20, 200
\$ 00,000.00	October 27, 200

TOTAL MONEY ADVANCES: \$ 00,000.00

Advance Checks:

Name of Payee:
 Bank Account:
 Name of Bank & Location:
 Name of Account Holder:
 Account Number:
 ABA Routing Number:



INITIALS INITIALS

APPENDIX A-4: MODEL CONTRACT

**Contract for the
International Commercial Sale of Perishable Goods**

1 PARTIES

SELLER

Name _____

Address _____

_____ *If different, address of Seller's place
of business through which this contract is to be performed* _____

Telephone _____ Fax _____ E-mail _____

Authorized signatory (name and position) _____

BUYER

Name _____

Address _____

_____ *If different, address of Buyer's place
of business through which this contract is to be performed* _____

Telephone _____ Fax _____ E-mail _____

Authorized signatory (name and position) _____

2. GOODS

Description of the goods (including details, as appropriate, concerning required quality, certificates, and country of origin) _____

Quantity (including unit of measurement)

• Total quantity _____

• Per delivery instalment _____

• Tolerance percentage: plus or minus _____ %

2 Contract for the International Commercial Sale of Perishable Goods - International Trade Centre UNCTAD/WTO

Inspection of goods (where an inspection is required, specify, as appropriate, details of organization responsible for inspecting quality and/or quantity, place and date/period of inspection, responsibility for inspection costs) _____

Details, as appropriate, concerning packaging and other similar conditions

Any other specification _____

3. DELIVERY

Applicable ICC Incoterm (By reference to most recent version of the Incoterms at date of formation of contract) _____

Place of delivery _____

Date or period of delivery _____

Name and address of carrier (where applicable) _____

Unless otherwise agreed, delivery shall be Ex Works (as per ICC Incoterm EXW) at the address of the Seller's place of business through which this Contract is to be performed.

4. PRICE

Price (specify whether total price and/or price per unit of measurement, specify the amount in both figures and words, and the currency) _____

Method for determining the price (if appropriate) _____

Where the price has not been and cannot be determined, it shall be that generally charged, in the same trade, for such goods delivered under comparable circumstances or, if such price cannot be established, a reasonable price.

Contract for the International Commercial Sale of Perishable Goods - International Trade Centre UNCTAD/WTO 3

5. PAYMENT

Means of payment (e.g. cash, cheque, bank draft, transfer) _____

Details of Seller's bank account (if appropriate) _____

Unless otherwise agreed, the amounts due shall be transferred by teletransmission to the Seller's bank account, and the Buyer shall be deemed to have performed its payment obligations when the said amounts have been received by the Seller's bank.

Payment of the price shall be made within 30 days after the date of invoice, unless the parties agree a different period hereafter: _____

THE PARTIES MAY CHOOSE A PAYMENT ARRANGEMENT AMONG THE POSSIBILITIES SET OUT BELOW, IN WHICH CASE THEY SHOULD SPECIFY THE ARRANGEMENT CHOSEN AND PROVIDE THE CORRESPONDING DETAILS:

PAYMENT IN ADVANCE

Amount due (i.e. all or part of the price, or expressed as a percentage of the total price)

Latest date for payment to be received by Seller's bank: _____

Special conditions applying to this payment (if any) _____

In the event that the advance payment does not correspond to the total price, the balance due shall be payable within 30 days of the date of invoice, in accordance with the conditions set out above, unless otherwise specified hereafter: _____

PAYMENT BY DOCUMENTARY COLLECTION

Amount to be paid (specify whether total price or price per delivery instalment)

Latest date for payment _____

Means of payment: D/P (i.e. documents against payment), unless the parties specify D/A (i.e. documents against acceptance) hereafter: _____

Payment by documentary collection shall be subject to the ICC Uniform Rules for Collections. The documents to be presented are specified at Article 6 below.

PAYMENT BY IRREVOCABLE DOCUMENTARY CREDIT

The Buyer must arrange for an irrevocable documentary credit in favour of the Seller to be issued by a reputable bank, subject to the ICC Uniform Customs and Practice for Documentary Credits. The issue must be notified at least 14 days before the agreed date for delivery, or before the beginning of the agreed delivery period specified at Article 3 above, as appropriate, unless the parties agree otherwise as specified hereafter. Latest agreed date for issue: _____

4 Contract for the International Commercial Sale of Perishable Goods - International Trade Centre UNCTAD/WTO

The credit shall expire 14 days after the end of the period or date of delivery specified in Article 3 above, unless otherwise agreed hereafter: _____

The documentary credit does not have to be confirmed, unless the parties agree otherwise, as specified hereafter: _____

All costs incurred in relation to confirmation shall be borne by the Seller, unless the parties specify otherwise hereafter: _____

Unless otherwise agreed, the documentary credit shall be payable at sight and allow partial shipments and transshipments.

PAYMENT BACKED BY BANK GUARANTEE

The Buyer shall provide, at least 30 days before the agreed date of delivery or the beginning of the agreed delivery period specified at Article 3 above as appropriate, unless the parties specify hereafter some other date: _____ either a first demand bank guarantee subject to the ICC Uniform Rules for Demand Guarantees, or a standby letter of credit subject either to such Rules or to the ICC Uniform Customs and Practice for Documentary Credits, in either case issued by a reputable bank.

OTHER PAYMENT ARRANGEMENTS

6. DOCUMENTS

The Seller shall make available to the Buyer or, as the case may be, shall present to the Bank specified by the Buyer, the following documents (tick corresponding boxes and indicate, as appropriate, the number of copies to be provided):

- Commercial invoice _____
- The following transport documents (specify any detailed requirements): _____

- Packing list _____
- Insurance documents _____
- Certificate of origin _____
- Certificate of inspection _____
- Customs documents _____
- Other documents _____

Unless otherwise agreed, the Seller shall make available to the Buyer the documents indicated in the applicable incoterms.

7. FAILURE TO COMPLY WITH A PAYMENT DEADLINE

If the Buyer does not pay a sum of money when it falls due, the Seller is entitled to interest upon that sum from the time when payment is due to the time of payment. Unless the parties agree otherwise, the rate of interest shall be 2% above the average bank short-term lending rate prevailing for the currency of payment at the place of payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place, and if the parties have not agreed upon a specific rate, the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment. *Other rate of interest agreed by the parties if appropriate:* _____

The Seller shall be entitled to terminate this Contract by notice to the Buyer as regards goods for which payment has not been made for any reason whatsoever (excluding a temporary impediment in the event of force majeure within 14 days (unless the parties agree some other period: _____) after the date on which the said payment falls due.

8. FAILURE TO COMPLY WITH A DELIVERY DEADLINE

When there is delay in delivery of any goods, the Buyer is entitled to liquidated damages equal to 0.5% (unless the parties agree some other percentage: _____) of the price of those goods for each complete day of delay as from the agreed date of delivery or the last day of the agreed delivery period, as appropriate, provided the Buyer notifies the Seller of the delay, and subject to any extension resulting from force majeure.

Where the Buyer so notifies the Seller within 7 days from the agreed date of delivery or the last day of the agreed delivery period, damages will run from the agreed date of delivery or from the last day of the agreed delivery period. Where the Buyer so notifies the Seller more than 7 days after the agreed date of delivery or the last day of the agreed delivery period, damages will run from the date of the notice. *If the parties wish to modify either or both of the above-mentioned 7-day deadlines they should do so hereafter:* _____

Liquidated damages for delay shall not exceed 20% of the price of the delayed goods, or such other maximum amount as may be agreed hereafter: _____

The Buyer shall be entitled to terminate this Contract by notice to the Seller as regards goods which have not been delivered for any reason whatsoever (excluding a temporary impediment in the event of force majeure within 14 days after the agreed delivery date or the end of the agreed delivery period, as appropriate, unless the parties specify some other period hereafter: _____

9. FORCE MAJEURE

A party is not liable for a failure to perform any of its obligations in so far as it proves:

- That the failure was due to an impediment beyond its control, and
- That it could not reasonably be expected to have taken into account the impediment and its effects upon its ability to perform at the time of the conclusion of this Contract, and
- That it could not reasonably have avoided or overcome the effect of such impediment.

A party seeking to be relieved of liability on grounds of force majeure shall, as soon as the impediment and its effects upon its ability to perform become known to that party, give notice

6 Contract for the International Commercial Sale of Perishable Goods - International Trade Centre (UNCITRAL/WTO)

to the other party of such impediment and its effects on its ability to perform, together with all appropriate supporting documents. Notice shall be given if and when the event of force majeure ceases. Failure to give either notice or such documents makes the party thus failing liable to damages for loss which otherwise could have been avoided.

Where the impediment could be merely temporary i.e. where the impediment does not necessarily have the effect of rendering performance impossible and could end within a period of 30 days unless the parties agree hereafter some other period; then the period of performance shall be extended until the impediment has ended, or the expiry of the said period, whichever is the earlier.

If performance is still impossible on expiry of this period, or if and as soon as performance becomes definitively impossible, either party shall be entitled to terminate this Contract upon notice to the other party of its decision to terminate.

10. FUNDAMENTAL NON-PERFORMANCE

A party may, by notice to the other party, terminate this Contract in the event of fundamental non-performance by the other party.

The following circumstances constitute examples of fundamental non-performance:

- Failure of the Buyer to comply with its undertaking, if appropriate, to procure the opening of an irrevocable letter of credit or to provide a first demand bank guarantee by the due date specified in Article 5 above;
- Failure of the Buyer to pay any sum by the date upon which the other party is entitled to terminate this Contract in accordance with the provisions of Article 7 above;
- Failure of the Seller to deliver all of the goods by the date upon which the Buyer is entitled to terminate this Contract in accordance with the provisions of Article 8 above;
- A manifest incapacity on the part of either party to fulfil its contractual obligations by reason of bankruptcy or liquidation proceedings, or any other suspension or stoppage of its activities.

In the event of fundamental non-performance, the aggrieved party may, at its discretion:

- Terminate the contract, and recover damages from the defaulting party; and/or,
- Sell or purchase, as appropriate, the goods, in which event the defaulting party shall make good any loss suffered by the aggrieved party.

Any dispute in relation to the damages due upon termination, and/or the losses suffered, as appropriate, shall be settled in accordance with the dispute resolution procedure agreed upon in this Contract.

11. EXPERTISE PROCEDURE

In the event that the Buyer is not satisfied with the quality of the goods delivered or to be delivered, it must inform the Seller of such dissatisfaction as soon as possible, and in any event within 7 days of delivery of the goods or such other period as the parties may agree hereafter:

The Buyer shall immediately apply to the following institution _____ for an expert to be appointed. If no institution has been specified by the parties, then the Buyer shall immediately proceed to appoint an expert. Any expert appointed shall be independent of the parties.

Contract for the International Commercial Sale of Perishable Goods - International Trade Centre (UNCITRAL/WTO)

The expert shall consider and report to the parties on the alleged nonconformity of the goods.

For this purpose, the expert shall be entitled to inspect the entire goods, or samples taken under his/her supervision, and may carry out any test which he/she considers to be appropriate.

The expert shall submit his/her report to both parties by registered post. The report shall be final and binding upon the parties unless, within 45 days after it has been received (or such other period as the parties may agree hereafter: _____), it is challenged by one of the parties by the commencement of proceedings in accordance with the dispute resolution procedure provided under this Contract.

The expert's fees and expenses shall be borne by the Buyer pending completion of the expertise procedure, but shall be reimbursed to the Buyer by the Seller if the nonconformity of the goods with the contractual requirements is established.

12. MITIGATION OF HARM

In the event of dissatisfaction with the quality of the goods delivered, the Buyer must take all such measures as are reasonable in the circumstances to preserve the goods. The Seller shall be obliged to reimburse the cost of such measures if the nonconformity of the goods with the contractual requirements is established.

If the goods are subject to rapid deterioration, or their preservation would involve unreasonable expense, the Buyer must take reasonable measures to sell them on the best terms available, after notifying the Seller of its intention to sell. The Buyer must nevertheless retain appropriate samples for the purposes of an expertise procedure and must give the Seller (and any expert appointed in accordance with Article 11 above) an opportunity to be represented when such samples are taken.

13. COMMUNICATIONS BETWEEN THE PARTIES

All communications between the parties in relation to this Contract must be made in writing and sent by ordinary post (unless some other form of postal delivery is agreed hereafter: _____), by fax or by electronic mail. Any communication sent via electronic mail must be in a 'read only' format or in some other format in which it is not possible to modify the message received. Communications via fax or electronic mail are made entirely at the sender's risk.

References in this Contract to days are to calendar days.

14. APPLICABLE RULES OF LAW

In so far as any matters are not covered by the foregoing provisions, this Contract is governed by the following, in descending order of precedence:

- The United Nations Convention on Contracts for the International Sale of Goods
- The UNIDROIT Principles of International Commercial Contracts, and
- For matters not dealt with in the above-mentioned texts, the law applicable at _____ or, in the absence of a choice of law, the law applicable at the Seller's place of business through which this Contract is to be performed.

8 Contract for the International Commercial Sale of Perishable Goods - International Trade Centre UNCTAD/WTO

15. DISPUTE RESOLUTION

In the event of any difficulty in relation to the performance of this Contract, the parties undertake that they will proceed diligently with good faith negotiations in an attempt to find the solution best adapted to the situation. If the difficulty relates to the conformity of the goods, the parties undertake to have recourse to the expertise procedure specified in Article 11 prior to any other procedure. If such steps prove unsuccessful, either party may have recourse to the dispute resolution procedure set out below.

Unless otherwise agreed, all disputes arising out of, or in connection with, this Contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by a single arbitrator appointed in accordance with the said Rules.

If the amount in dispute is less than 100,000 United States dollars, the parties agree that the arbitrator shall decide the case solely on the documents submitted by the parties and waive the right to require a hearing, including a procedural hearing.

If the amount in dispute is greater than one million United States dollars, the parties agree that the ICC International Court of Arbitration shall constitute an arbitral tribunal comprising three arbitrators should one of the parties so require.

AGREED MODIFICATIONS, IF ANY, TO THIS PROCEDURE: _____

OTHER DISPUTE RESOLUTION PROCEDURE CHOSEN: _____

16. DATE AND SIGNATURE FOR THE SELLER AND BUYER

SELLER
Date _____
Name _____

BUYER
Date _____
Name _____

Signature

Signature

